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IN THE

Supreme Court of the United States

October Term, 1964.

No. 419

BEN LAPENSOHN,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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No.

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COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above entitled case on May 27, 1964.

CITATION TO OPINIONS BELOW.

The Order of the Supreme Court of Pennsylvania denying Allocatur (Appendix A,[1] Page 1a) has not been officially reported. The Opinion of the Superior Court of Pennsylvania (Appendix C, Page 3a) and the Dissenting Opinion in the Superior Court of Pennsylvania (Appendix D, Page 37a) were reported in — Pa. Super. —, 199 A. 2d 139, 159 (1964). The opinion of the trial judge (printed as part of the Supplemental Record filed in the Supreme Court of Pennsylvania, nine copies of which are being filed herewith), has not been officially reported.

1. Five of the six defendants in this case are filing petitions for writs of certiorari. The opinions and orders of the courts below have been printed as a separate joint appendix to these petitions.

JURISDICTION.

The Order of the Supreme Court of Pennsylvania denying Allocatur (Appendix A, Page 1a), was entered on May 27, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PA. STAT. ANN. tit. 18, § 4302:

"Conspiracy to Do Unlawful Act.

"Any two or more persons who falsely and maliciously conspire and agree to cheat and defraud any person of his moneys, goods, chattels, or other property . . . are guilty of conspiracy, a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment, by separate or solitary confinement at labor or by simple imprisonment, not exceeding two (2) years, or both."

QUESTIONS PRESENTED.

1. Where petitioner was indicted without a preliminary hearing, as normally required under Pennsylvania law, and without any compelling or emergency reasons for dispensing with the hearing, was petitioner deprived of due process and equal protection of the law guaranteed by the 14th Amendment?

2. Where, in a lengthy trial, the judge became an advocate for the prosecution, frequently criticized and ridiculed defense counsel and their objections, cross-examined witnesses, suggested to the jury inferences not based on facts in evidence, made unfair comments on evidence and rendered an argumentative charge, was petitioner deprived of a fair trial guaranteed by the Constitution?

3. Where, after a lengthy trial, the trial court refused petitioner a reasonable time to prepare post-trial motions, and where the trial judge refused to admit appellant to bail after conviction, thus forcing an immediate appeal, and where the appellate court refused a continuance even for a reasonable time so that counsel had to prepare briefs before the record was printed and even before the trial judge filed an opinion, was petitioner deprived of the effective assistance of counsel, as guaranteed by the Constitution?

4. Where petitioner was convicted of a crime for which the Statute of Limitations had run, was he deprived of due process and equal protection of the law guaranteed by the 14th Amendment?

5. Where six Union officials or employees, charged with conspiring to cheat the Union (a misdemeanor), were tried jointly but the trial court allowed all of them only a

total of six peremptory challenges, the same number to which any one would have been entitled if tried separately, and voir dire of prospective jurors was unduly restricted, was petitioner deprived of his constitutional right to the selection of a fair jury?

6. Where there was no evidence of petitioner's guilt of the crime with which he was charged, does his conviction constitute a deprivation of due process of law guaranteed by the 14th Amendment?

STATEMENT OF THE CASE.

Petitioner, an insurance broker and former employee of Local 107 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was indicted along with six officials of that Union, and all were charged with conspiring to cheat and defraud the Union and its members of their moneys, goods, chattels and other property. After a lengthy trial they were convicted and sentenced to various terms of imprisonment. The convictions were affirmed by the Superior Court of Pennsylvania, with one judge dissenting. The Supreme Court of Pennsylvania refused to review the decision of the Superior Court, despite many troublesome problems of constitutional law and criminal procedure raised in the appeal.

Summary of Proceedings.

In order to understand the petitioner's allegations that he was deprived of substantial constitutional rights by the action of the Commonwealth and of the courts below, it is necessary to describe the incidents leading to his indictment without a preliminary hearing and to follow the proceedings through his trial, post-trial motions and appellate proceedings.

Pre-Indictment: The 1958 investigation of labor activities in the Philadelphia area by the United States Senate Committee led to much publicity in the local papers criticizing leadership of Local 107 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. In January 1959 some of the records of the committee were turned over to the District Attorney of Philadelphia. In September 1959, the District Attorney filed a petition seeking the convening of a Special Grand Jury, which petition was granted by Honorable Joseph E. Gold on September 3, 1959. A petition for Writ of Prohibition was filed on behalf of some of the officers of the Union in the Supreme Court of Pennsylvania and was granted by that Court, speaking through Justice Curtis Bok, with Justices Bell and B. R. Jones dissenting. The Court concluded there was no emergency or danger to the public justifying such an extraordinary remedy.

After the petition for Writ of Prohibition had been filed, but before the Supreme Court acted, on September 15, 1959, Honorable Victor H. Blanc, then District Attorney of Philadelphia, petitioned the Court of Quarter Sessions of Philadelphia County for leave to present a bill of indictment to the Grand Jury without a preliminary hearing (R. 6a-102a) [2] as normally required under Pennsylvania law. Based on the ex parte petition of the District Attorney, leave was granted on September 16, 1959, by Honorable Vincent A. Carroll (R. 10a), sitting in the Quarter Sessions Court, and testimony was presented to the Grand Jury for two days. That Grand Jury found a true bill charging the seven defendants with conspiring from June 10, 1954, continuing to September 19, 1957, to cheat and

2. References prefixed by an "R" and suffixed by an "a" are to the 12 volume record printed for filing in the Superior Court, nine copies of which are being filed with this petition. The opinion of the trial court was printed as a Supplemental Record for filing in the Superior Court, and nine copies are also being filed herewith. References thereto are designated "Supplemental Record" and are suffixed by a "b".

defraud the Union and its members. (One of these defendants, Joseph Grace, later died, and the action as to him was abated April 1, 1963, after the trial had commenced (R. 3a).) In that indictment, the Grand Jury specifically presented that petitioner Lapensohn "from May 9, 1957 and continuously thereafter until July 3, 1958 was not an usual resident or inhabitant of the Commonwealth" (R. 12a).

A Petition for Habeas Corpus was filed on behalf of petitioner Lapensohn on September 23, 1959 (R. 27a). (A similar petition was filed by the other defendants on the same day (R. 30a).) Testimony relating to the alleged necessity of the District Attorney to proceed in this unusual fashion was taken on a number of days over the next several months before Honorable Joseph Gold who thereafter received the briefs, heard the arguments and then denied the petition. He concluded that the District Attorney properly feared the statute of limitations might run if there were a preliminary hearing; although the situation may have been caused by the inaction of the District Attorney for nine months during which he had the information, he had acted in good faith. No reference was made in this opinion to the fact that petitioner Lapensohn had been out of the jurisdiction for 14 months. (Judge Gold's opinion, dated August 22, 1960 is not part of the record in this case, and has not been reported officially.) A timely appeal was filed in the Superior Court of Pennsylvania on behalf of all defendants, but was withdrawn July 10, 1961 (R. 29a) after that Court decided the case of *Commonwealth ex rel. Nichols v. Lederer*, 193 Pa. Super. 482, 165 A. 2d 711 (1960), *aff'd*, 404 Pa. 218, 172 A. 2d 319 (1961), which held that the dismissal of a petition for writ of habeas corpus is an interlocutory decision.

Petitioner then raised the same issue on September 25, 1961 by a Motion to Quash the Indictment (R. 1a, 19a). The other defendants filed a similar motion (R. 22a). By stipulation, it was agreed that the Court would rule upon

the motion based solely upon the notes of testimony of the hearings held before Judge Gold (R. 25a). After argument and consideration of briefs, the Court en banc, consisting of Honorable Joseph Sloane, Honorable Gerald A. Gleason, and Honorable Francis X McClanaghan, on April 11, 1962 denied the Motion to Quash the Indictment (R. 1a, 1153a). On May 31, 1962, after reargument and further consideration, the same Court en banc again so ruled (R. 1a, 1154a). This Motion was renewed at the commencement of the trial and was again denied by the trial judge (R. 188a-1189a).

The trial commenced March 25, 1963 before Honorable David L. Ullman and a jury. On May 27, 1963 after presenting testimony lasting ten weeks and one day and offering almost 1100 exhibits, the Commonwealth rested its case. Motions on behalf of petitioner and the other defendants were denied, and the defendants rested. After closing speeches by counsel, on June 3, 1963 the trial judge instructed the jury which retired at 10:20 o'clock P. M. At 11:40 o'clock P. M., one hour and ten minutes later, the jury returned with a verdict of guilty as to all defendants.

Post-Trial and Appellate: A chronology of the post-trial proceedings must be set out in detail to demonstrate the inordinate and unusual haste with which this petitioner and the other defendants were compelled to perfect their post-trial proceedings.

After the verdict of guilty, the trial judge instructed the defendants to file their motions for new trial and arrest of judgment in four days (R. 4534a) and their supplemental reasons within an additional eleven days (R. 4535a). Petitioner Lapensohn filed his motions on June 6, 1963 (R. 4662a), and thirty-six additional reasons on June 17 (R. 4667a-4694a). The trial judge also required briefs to be filed by July 3, and scheduled argument for July 10 (R. 4535a). Petitioner Lapensohn's counsel thus had only a short time to review over 4500 typewritten pages of notes of testimony, and finally submitted a brief of thirty-four

typewritten pages by July 3. The case was argued on July 10, and five days later the trial court denied all the motions, sentencing petitioner to a term of imprisonment for not less than ten months nor more than two years in the State Correctional Institution at Philadelphia (R. 4756a). (All of the other defendants were also sentenced to imprisonment in the State Correctional Institution, one of the defendants receiving a sentence of not less than one nor more than two years with a fine of $500.00, one receiving a sentence of eight to twenty-three months, one receiving six to twenty-three months, and two receiving terms of three to twenty-three months (R. 4755a-4756a).) At the same time, the trial court refused to admit the defendants to bail pending their appeals.

Thus, in order to obtain the release of petitioner on bail, instead of taking the 45 days permitted by law to file an appeal,[3] counsel for petitioner had to perfect an appeal to the Superior Court on the same day as the sentence was imposed. At the same time he petitioned the Superior Court for bail pending the appeal and for a special supersedeas, which petition was granted by the Honorable Gerald F. Flood, Judge of the Superior Court, who set bail for Lapensohn in the amount of $4,500.00.

As a result of this unusual proceeding, the brief of petitioner Lapensohn became due, under Rule 47 of the Superior Court, at least fifteen days before the commencement of the fall term, which was September 9, 1963. On July 19, 1963, petitioner and the other defendants filed a petition in the Superior Court requesting a continuance of the case to the December list (see Appendix E, page 41a), assigning as reasons therefor the fact that the three largest legal printers in the Philadelphia area had informed them that it would be impossible to print the record in less than eight to sixteen weeks; that counsel had

3. The Pennsylvania Statute states: "No appeal shall be allowed, in any case, from a sentence or order of any court of quarter sessions or oyer and terminer, unless taken within forty-five days from the entry of the sentence or order." PA. STAT. ANN. tit. 12 § 1236.

been continuously engaged in the preparation and trial of the case and preparation and argument of post-trial motions, almost full time, from February, 1963 until this date; furthermore, counsel for petitioner Lapensohn was scheduled to commence a lengthy trial in the United States District Court for the Eastern District of Pennsylvania, which had been specially set for September 9, 1963, and which would require some preparation. This petition for continuance was denied by the Superior Court on July 20, 1963, *which ordered that the case be argued on the original record (only one typewritten copy of which was available to counsel for all the defendants), with the printed record to be filed as promptly as possible after argument, which was set for the first day of the fall term, September 9, 1963.*

On August 13, 1963, petitioner again joined in a second petition to the Superior Court (see Appendix F, page 50a) requesting that the matter be continued to the December, 1963 list. In addition to repeating the reasons contained in the earlier petition, the *petition further alleged that the trial judge had not yet filed his opinion,* despite Rule 46 of the Superior Court which requires the trial judge to file his opinion "forthwith" after service of notice of the appeal, *and the stenographer had not yet filed the notes of testimony,* as required by that Rule. Furthermore, counsel alleged that he had requested a continuance of his specially listed federal case and had been refused, so that he was scheduled to be in both the Superior Court of Pennsylvania and the United States District Court on the same day at the same time. Nonetheless the petition was again refused by the Superior Court.[4]

On August 26, 1963, counsel for petitioner Lapensohn filed in the Superior Court a seventy-one page brief. At that time the trial judge had not yet filed his opinion. On

4. After the Superior Court refused the continuance, the United States District Judge relented and granted counsel a continuance for one day, so that counsel for Lapensohn on September 10, 1963 commenced a trial in the United States District Court which lasted the following five weeks.

September 3, 1963 the trial judge finally filed an opinion which was one hundred and fifteen typewritten pages long (Supplemental Record, 1b-109b). The Commonwealth did not file its briefs until September 6, 1963, even though Rule 47 requires appellee to file five days before the first day of the session. On September 9, 1963 the case was argued before the Superior Court for a full day.

The actual printing of the record was not completed for several months, and the last volume was not filed until December 31, 1963. The Superior Court finally entered its decision affirming the convictions of March 19, 1964. All of the issues raised in this petition, among others, were raised in the Superior Court, as they had been in the trial court. The Superior Court reaffirmed Judge Gold's opinion that the District Attorney had acted in good faith in seeking indictment without a preliminary hearing and that no harm had resulted to appellants; however, *the Court made no reference to the fact that there was no emergency as to petitioner Lapensohn.* The Court also summarized the evidence (in many instances incorrectly) and concluded that it was sufficient to sustain the convictions of all defendants. In determining that the Statute of Limitations had not run, the Court completely misinterpreted several vital facts and drew inferences not justified by the facts. As to the limitation of the right of peremptory challenges, the Superior Court simply concluded that legislature had a right to impose limitations; it did not determine whether the trial court in refusing some extra challenges and in limiting voir dire denied petitioner of an opportunity to select a fair jury. As to the conduct of the trial by the trial judge, the Court simply stated that the trial judge had retained his composure exceptionally well in a long, drawn out, hard fought trial. Judge Watkins dissented on the ground that the last overt act in the alleged conspiracy was the delivery of the checks to the named co-conspirators, not the cashing of those checks, and that there had been

no evidence, only conjecture, as to when or by whom they had been cashed.

Petitioner Lapensohn filed in the Superior Court a petition requesting a reargument, noting that there were several issues overlooked or misapprehended by the Court. This petition was denied April 13, 1964. A timely petition for allowance of appeal was filed in the Supreme Court of Pennsylvania raising the constitutional issues here presented, but, on May 27, 1964 the Supreme Court denied the petition for allowance of appeal. Thus, the case was never argued on the merits before the highest appellate court of this Commonwealth.

Summary of Testimony.

Since it is here argued, as it was in the lower courts, that petitioner was convicted without any evidence of his guilt, it is necessary to summarize the testimony offered during this ten-week trial. The evidence, even interpreted most favorably to the Commonwealth, tended to show the following.

During the period involved in the indictment, defendant Cohen was the secretary-treasurer of the Union; defendant Grace was the president; Hartsough was bookkeeper; Walker was recording secretary; Berman was business agent, and Elco was a union organizer. *Petitioner Lapensohn was not employed by the Union until the week ending July 2, 1954* (it was stipulated that he received his first pay check by that date, R. 4031), *even though the indictment charged formation of the conspiracy on or about June 10, 1954.* His function was that of public relations adviser to the Union. Furthermore, Mrs. Battisfore testified that Lapensohn left the Union prior to November, 1956, just before she was fired (R. 3541a-3543a); it was stipulated that he received his last pay check November 1, 1956 (R. 4013a). *Thus, Lapensohn's connection with the Union ended by November 1956, even though the indictment*

charges that the conspiracy continued until September 19, 1957. However, the testimony can be classified into twenty separate incidents, dealing with four separate categories: the first category relates to the alleged efforts of some of the defendants to seize control of the Union and to use Union funds thereafter to reimburse retroactively the expenses incurred in obtaining control; the second relates to alleged diversion of Union funds; the third relates to financial transactions between defendants apparently intended to show the flow of allegedly diverted Union funds; and the last relates to the obtaining of favorite financial treatment in return for concessions during contract negotiations.

A. Obtaining Control, Reimbursement of Election Expenses.

1. *Events prior to and immediately following the Cohen election:* In November, 1953 there had been a regularly scheduled general election of the Local, at which Grace was re-elected as President and Cohen defeated an individual named Crumbock as Secretary-Treasurer. The results were contested, a Trustee was appointed by the International Union, and a new election was held in April, 1954. At this election, Cohen was elected by a resounding majority (R. 3176a). After the election, the Recording Secretary Kelly (R. 3159a-3176a), who had supported Crumbock, was asked to resign and ultimately did. Walker was appointed to replace him. Kelleher (R. 1711a-1757a) and Fisher (R. 3277a-3286a), business agents, also Crumbock supporters, were also asked to resign (R. 3283a). The witness testified that although previously business agents had customarily been elected, Berman and others were thereafter appointed by Cohen. Hartsough became bookkeeper. There was also evidence that minutes of meetings which had formerly been kept in a copybook were thereafter typed and kept in a looseleaf book. Authorizations were filed with both banks for the Union account, permitting facsimile signatures of Cohen and Grace on checks under $1,000.00. It

is to be noted that Lapensohn was not employed by the Union until the last week in June of 1954.

2. *Reimbursement of election expenses and retroactive salary:* During the Cohen-Crumbock election, Local 169 of the I. B. & T. passed a resolution authorizing that Local to lend $3,000.00 to Local 107 and to pay printing bills, which amounted to $1,573.43, to support the election of Cohen and his slate (*Hartsough,* R. 3292a-3294a; *Fadigan,* R. 3304a-3308a). Later, these sums were repaid to Local 169 by checks from Local 107 (Exs. 743, 744). In addition, other bills for election expenses were repaid to Cohen by the Union, and Cohen received a check for retroactive salary for the period between November 1953 and April 1954.

3. *Payments to Cohen's election workers (Exs. 496 et seq.):* There were two checks drawn to cash, totalling $25,000.00, which were endorsed by Hartsough and which were used to pay individuals who worked for Cohen's election. A number of these employees (Graff, T. Charlton, F. Charlton, Doman, McNally, Price, Flanagan, Shenko, Brooks and Roski) testified that they received various sums of money and signed vouchers. There was testimony that the amounts shown on these vouchers were altered. There was no testimony showing who altered the vouchers.

4. *Trip to Miami (1954):* On July 12, 1954, a check (Ex. 709) in the sum of $1,000.00 was drawn by Cohen and Grace, and endorsed by Hartsough, supported by a voucher on Union letterhead (Ex. 710) covering expenses for a trip to Miami on February 15 and 16, 1954. However, there was testimony that the letterhead upon which the voucher was typed was not actually printed until June, 1954 (R. 3402a). In addition, another check (Ex. 711) in the amount of $5,673.80, payable to Cohen, was endorsed by Cohen and Hartsough, supported by vouchers (Ex. 712) bearing dates in January to May, 1954, on letterheads not printed until June, 1954.

B. Alleged Diversion of Union Funds.

5. *Friedman checks and insurance policies (Exs. 9, 12, 15, 17, 27, 30, 54):* During late 1954 and early 1955, a number of checks were drawn to the order of Jerome S. Friedman (R. 1557a-1564a) for the purchase of insurance policies on which petitioner Lapensohn was broker. There was evidence to show that Friedman (who died on November 21, 1961) did not sign these checks (R. 1574a). There was also evidence, that within a short time after all the checks to Friedman were drawn on Provident Tradesmens Bank and Trust Company, they were cashed at the Broad Street Trust Company (*Charlton*, R. 1555a-1564a). There was also evidence that at about the same time checks to Friedman were cashed, petitioner Lapensohn had deposits in his account at the Broad Street Trust Company and that the deposit slips showed the deposit of checks drawn on the Provident Tradesmens Bank and Trust Company in amounts similar to the Friedman checks (*Gretzinger*, R. 1579a et seq.). However, the testimony of Switt, Friedman's partner, also showed that Friedman received all moneys due him from Lapensohn for these policies (R. 3961a-3974a). There was evidence that the items insured under these policies consisted of sports equipment, boats and improvements to boats, with Raymond Cohen named as insured (Levering, R. 3975a-3987a). Some of these policies were placed by Raymond Cohen direct with Friedman.

6. *Katz's check (Ex. 22):* There was evidence that on January 10, 1956, a check was drawn by Local 107 on the Broad Street Trust Company, payable to Joseph E. Katz, in the sum of $1,000.00. An attorney named Joseph Katz (who testified that he never used a middle initial) testified that he did not work for this Union and never received this money. He had represented Lapensohn, but he had been paid for all services. He testified that he did not sign the check, and he does not know who did. There was evidence that on the same day the Katz check was cashed, a deposit

slip in Lapensohn's account showed the cashing of an unidentified $1,000.00 with $478.41 being deposited and the balance being given to the depositor. There was no direct evidence that this was the same check.

7. *Kanner checks (Exs. 34-39, 42):* During May, 1955 to August, 1956, several checks were drawn to the order of David Kanner. David Kanner, a Philadelphia attorney who represented the Union during the years 1954, 1955 and 1956, testified that the signatures on the checks were not his (R. 1761a to 1768a, 1781a-1784a), nor did he authorize anyone to sign for him (R. 1782a). But he admitted that all of his bills to the Union, totalling approximately $10,000.00, were paid, and he could not state how much of that money he received in cash, nor could he say that the money he received in cash was not the proceeds of these checks (R. 1782a-1783a). Another David Kanner, resident of Philadelphia, testified they were not his signatures either (R. 1811a-1813a). There was also evidence offered that on the same day that some of the checks were cashed there were deposits in Lapensohn's accounts reflecting similar amounts, although there was no direct testimony connecting these deposits with the checks. Mrs. Battisfore also testified that some checks were given to Lapensohn for transmittal to Kanner (R. 3433a). There was also testimony that Cohen made cash payments of $4,570.00 within two weeks of the cashing of three checks payable to Kanner in October, 1956 (*Young*, R. 2977a-2980a). However, there was no testimony connecting these incidents.

8. *Kirsch checks (Exs. 704, 705):* On December 20, 1954 a check for $4,000.00, and on September 24, 1954 a check for $4,500.00 marked "Returned election expenses" and "Repayment of Expenses" were drawn to Kirsch. Kirsch, who died April 8, 1958 (R. 3381a), was an employee of Rollee Advertising Agency, a corporation controlled by Lapensohn. These two checks were cashed by Kirsch at his bank and there were notations under the endorsements in-

dicating that Lapensohn's name or a similar name (one of the erased identifications was spelled "Lopinson") had been used to identify Samuel Kirsch to permit his cashing of checks. There were no vouchers to support these checks.

9. *Mastrin payment (R. 1789a-1801a, 3750a-3767a, Ex. 43):* Mastrin, an architect who did work for the Union in 1956, dealt with petitioners Lapensohn and Cohen. He testified that he submitted bills totalling $6,000.00 which were ultimately paid by the Union. On June 7, 1956 he received a check for $2,500.00 in partial payment which was brought to him by petitioner Lapensohn. He admitted that he went to the bank with Lapensohn and endorsed the check, gave it to Lapensohn to cash, then gave Lapensohn $1,000.00 of the proceeds. He did not ask for or receive a note, and never asked for the return of the money. However, he admitted that this money was his own and not the Union's at the time he turned it over to Lapensohn.

10. *Lazovitz-Marshall & Co.:* Robert Lazovitz and Morris Marshall were partners until 1956 or 1957, when they incorporated under the name of M. Marshall & Co., Inc. They entered into a contract with the Union on June 5, 1956 for the construction of a building in Wilmington. There was testimony that the signature on a check drawn to M. Marshall, dated April 16, 1956, in the sum of $2,967.95, was not Marshall's signature. There was no entry on the Company's books for this amount and no deposit in the Company's bank account at the time for that amount. The check was cashed at the Broad Street Trust Company on the same day that Lapensohn made a deposit in the amount of $482.60, consisting of $25.00 cash, two checks for $176.90 each, a check for $75.00, and a check for $28.80. There was no attempt to tie in Lapensohn's deposits with the aforesaid check to Marshall. In addition, there were checks from the Union to the Company for $10,080.00 and $4,800.00, but no entry appeared on the Company's books reflecting the $4,800.00, and there was no deposit in the Company's ac-

count at that time for that amount. The checks were endorsed "M. Marshall & Co., by Robert Lazovitz, President."

On the same day, Lapensohn's deposit slip shows a deposit of $1,253.75, composed of $980.78 in cash, checks of other banks for $150.00, $85.00 and $38.00. There was nothing on the deposit slip or the checks to show any connection between them. There were also checks to the Marshall Co. for $955.00 and $3,125.00, with no entries in the corporate books and no deposit slips in the Company's account. There was also no direct testimony connecting Lapensohn.

11. *International Convention in Miami (1957):* There is testimony that there were five checks, all dated September 16, 1957, drawn to five of the defendants, not including petitioner Lapensohn, in varying amounts, to be used for expenses in connection with the Teamster's Convention in Florida at the end of September and beginning of October, 1957. One (Ex. 718) was a check to Cohen for $3,000.00, one (Ex. 868) was a check to Grace for $2,500.00, another (Ex. 869) was a check to Elco for $1,570.00, another (Ex. 870) was a check to Walker for $2,000.00, and the last (Ex. 871) was a check to Berman for $2,000.00. There was testimony that Cohen's check was deposited with the Seville Hotel at Miami Beach, Florida, on September 16, 1957, the same day it was drawn (R. 3488a-3490a); Grace's check bore the genuine endorsement of Grace and was cashed; Elco's and Walker's checks bore the endorsements of those individuals and of Hartsough, and there was testimony that Hartsough was authorized to sign their names and that both checks were cashed. There was no further testimony as to the date of cashing those checks. However, *the exhibits themselves showed that all except Grace's check were cashed on September 16. Grace's was cashed September 19, 1957. There was no testimony as to who cashed Grace's check or where it was cashed.* There was testimony that the Hotel Seville's record showed that Cohen's expenses amounted

to $1,500.00 (R. 3492a), that he received change from his original deposit and subsequent deposit; Walker's expenses at the hotel were $285.19; Elco's were $127.77; Berman's were $512.20; and Grace's amounted to $605.43. An employee of Eastern Airlines testified that the round-trip fare, first class, at that time amounted to $155.87. This evidence was offered in an attempt to show that those specific defendants received more money than their actual expenses, and was offered as proof of the last overt act in the alleged conspiracy.

12. *Clothing purchases at Diamond & Co. (Exs. 68-92):* Employees of Diamond & Co., clothing retailers in Philadelphia, testified that they sent statements to Cohen in 1955 for purchases of clothing, and received Union checks in payment thereof. There is testimony concerning sales slips covering items charged to Cohen's account by Union employees, including a purchase by Walker. There was no direct evidence that those purchases were for the personal use of any of the defendants.

13. *Horn & Hardart strike (Exs. 119-239):* In May, 1955 to May, 1956, various individuals were paid by the Union to picket Horn & Hardart in an attempt to organize that company. The Union drew checks to cash, which were endorsed by Hartsough, and the vouchers for those checks showed payments to various individuals for working on the picket line. A number of those individuals were called to testify that they received $30.00 per week in sealed envelopes, and signed the vouchers in blank. They identified their signatures but not the amounts appearing after their names, some of which exceeded $30.00. Several testified that they were usually paid by an individual named Lindsay, who died September 27, 1960 (Ex. 276); some testified that Elco was sometimes there and that Cohen and Hartsough appeared at headquarters once or twice at the beginning of the strike. A few of the vouchers were signed by Elco on behalf of some of the men who testified that they

had received the money and others authorized Elco to get it for them since they were busy at paytime (Owens, Bailey, Burton). Elco paid the rent and expenses for strike headquarters. It should be noted that this evidence was ruled by the judge as being immaterial as to petitioner Lapensohn (R. 2265a, 2453a-2468a).

14. *Gallagher strike (1957):* There was testimony that members of the Union were paid for picketing Gallagher & Sons during the year 1957, during a strike. Checks totalling $29,710, drawn to cash, were endorsed by Hartsough. A number of the employees testified that they received $40 per week for picketing and that they signed vouchers when they received their money but did not fill in the amounts. The amounts reflected on those vouchers, in some instances, showed more than that sum. They testified that Hartsough paid this money to them. There was no direct evidence to show who inserted the figures on the vouchers.

C. Financial Transactions Between Defendants.

15. *Grace checks (Exs. 278-300, 332-447):* Evidence was offered to show that a large number of checks were drawn by the Union, payable to Grace, for the period April 18, 1955 to April 14, 1957. There was no evidence that these amounts were deposited in his bank account, and there was testimony that some of the endorsements were not in Grace's handwriting. Some of those bore other persons' endorsements. Grace's bank account showed deposits usually in round figures (R. 2611a-2675a). Grace suffered a stroke in March, 1954, and was incapacitated at divers times, but he was capable of performing duties during 1956 to 1958, and even drove a car. Mrs. Grace testified that she saw him sign blank checks.

16. *Lapensohn checks from the Union (Exs. 493, 494, 495):* Lapensohn received three checks, one on September 14, 1955 ($850.00), one on September 15, 1955 ($812.50), and one on October 11, 1955 ($1,000.00), totalling $2,662.50,

without any vouchers supporting them (R. 3008a-3033a). However, the witness testified there were many checks without vouchers. Mrs. Battisfore identified stubs in the check book (Ex. 713) representing payments to Lapensohn in the following sums: $1,000; $1,000; $1,250; $950; $1,045; $955; $902; the amount on the next one is unknown; $1,000.72; and $919. Also see testimony of Flanagan (R. 3919a-3931a). Flanagan admitted that there were many disbursement checks which were not supported by vouchers (R. 3938a). In addition, there were 122 checks (Exs. 745-867) representing salary payments to Lapensohn from July 2, 1954 to November 1, 1956, representing gross salary of $200.00 per week (from July 2, 1954 to January 4, 1956), and $225.00 per week thereafter.

17. *Cohen-Lapensohn financial transactions:* A Lapensohn check dated September 14, 1956, payable to cash in the sum of $2,000 (Ex. 492), was cashed at the bank without endorsement. The name "Joe Hartsough" appeared next to the name of the maker, with the name "Ray" in parentheses. In addition, there was a check from Lapensohn to Cohen in the sum of $2,500 dated June 20, 1956 (Ex. 51), the purpose of which was never demonstrated. There was no direct testimony offered to show what happened to the proceeds of either of these checks.

18. *Cohen boat purchase (Ex. 45):* On March 30, 1955, a treasurer's check was drawn by the Broad Street Trust Co. and charged to the account of Ben and Esther Lapensohn, for $17,000 payable to Earl M. Reed. Keagle (R. 1828a-1824a) testified that he sold a boat to Cohen and received a treasurer's check for $17,000 payable to Reed.

19. *Cohen's financial condition:* Young (R. 2976a *et seq.*) testified that Cohen made cash payments of $4,570 on account of a home in Brigantine, New Jersey, in October, 1956, and total payments of $28,471 during the period July 1956 to May 1957. He admitted that he was with

Cohen when a $15,000 mortgage was created on the home. There was also testimony that Cohen received the proceeds of 166 checks (Exs. 508-670) which were payable to Cohen or to cash, and were endorsed by Cohen or Hartsough. These amounted to $20,625.00 and there were no vouchers to support them. However, there was no direct testimony tending to show what happened to the proceeds of those checks.

Mr. Stern (R. 3662a *et seq.*) testified that he paid Cohen $2,000 cash in 1954 for the purchase of a boat. Christiani (R. 3691a *et seq.*) testified he paid Cohen $9,000 on February 4, 1957 for an insurance loss to a boat. Ciliberti (R. 3697a *et seq.*) testified about the status of Cohen's bank account in 1956 and 1957. Kurowski (R. 3713a *et seq.*), of the Boardwalk National Bank, testified about a $15,000 mortgage created December 5, 1956 by Cohen and payments made thereon. Parkinson (R. 3781a *et seq.*), operator of The Sailfish Center, testified about payments made by Cohen. Gordon (R. 3791a *et seq.*) of the Gordon Boat Co., testified about Cohen's purchase of boats in 1956 and 1957. Sherwood (R. 3818a *et seq.*) a boat captain, testified he worked for Cohen for 15 weeks in 1956. Mitchell (R. 3825a *et seq.*) testified he sold the property in Brigantine to Cohen in 1956 and that Lapensohn, who is a real estate broker, represented Cohen as his agent at the settlement. Gretzinger (R. 3822a *et seq.*) testified about bank loans made to Cohen during 1956 and 1957, and payments made in 1957. Flanagan (R. 4035a *et seq.*) testified about the leasing of a property in Florida by Cohen in 1955.

There was no direct testimony tending to show that Cohen used proceeds of any funds illegally diverted from the Union. However, the Commonwealth offered the testimony of a government accountant, Ralph A. DeCarlo, in an attempt to show that Cohen's expenditures during a period of time exceeded his known financial resources during that time (R. 4040a *et seq.*). He was permitted, over objection,

to testify from charts based on an arbitrary period, part of which occurred after Mr. Lapensohn's connection with the Union had terminated, and which related to the financial condition of Cohen alone. There were no instructions to the jury limiting the use of the chart to each specific defendant. Furthermore, the witness was permitted to testify even though he admitted that the charts were incomplete, inaccurate and based on information not introduced in the evidence (R. 4124a-4186a).

D. Alleged Favored Financial Treatment.

20. *Trailer Drops, Food Fair Properties, Inc. and Dan River Mills Stock:* Magil (R. 1907a) testified that Eastman Dillon Co., underwriters of the stock issues, in September 1956, received a list of persons (Ex. 56) to receive favorable treatment in the purchase of Food Fair Properties, Inc. stock. This list, which he received from Louis Stein, contained the names of Cohen and Lapensohn, which were crossed out, and in substitution thereof was inserted the name of Lapensohn's brother-in-law, Jack Shore. He admitted that he also received many other names and testified that the company was under no obligation to honor the list. Richardson (R. 1984a), Trust Officer of the First Merchants Bank of Richmond, stock transfer agents for Dan River Mills, Inc., testified that in July 1955, 100 shares of that stock were transferred by Samuel Mandell to Petitioner Lapensohn.

There was testimony that Jack Shore purchased twenty units of Food Fair Properties, Inc. for $10,000 (R. 2225a). Mandell (R. 2224a) testified that he transferred 500 shares of Dan River stock to Lapensohn for $10,000.

Louis Stein (R. 2193a *et seq.*) testified that in March, 1955, at Lapensohn's request, he offered Lapensohn 500 options in Dan River stock at $20 per option, which were exercised in June, 1955 (R. 2196a-2198a). In August, 1955 Lapensohn asked if he and Cohen could each get 1,000 shares of Food Fair Properties, Inc. common stock (R.

2200a). Stein promised to suggest his name to Eastman Dillon. There were 1,100 names on the list, consisting of forty or fifty sheets of paper, which Stein finally supplied to Eastman Dillon, and only twenty of those names were connected with labor unions; the others came from all walks of life (R. 2208a-2210a). The reason he included Lapensohn's name was that he was a well-known figure in Philadelphia, particularly in labor circles. At the same time, Lapensohn asked Stein if Shore could purchase two hundred units of Food Fair Properties, Inc. debentures, worth $10,000 (R. 2204a-2205a).

The Commonwealth also offered the testimony of several witnesses who testified about negotiations (which negotiations were concluded on or about September 17, 1954) by the Union with food retailers concerning "trailer drops". Mr. Cupp (R. 2042a *et seq.*), president of Acme Stores, Inc., defined a trailer drop as permission for the food retailer company to leave a trailer loaded with merchandise at a store without unloading it on the spot. In 1954, during contract renewal negotiations, one of the issues the company was nogotiating for was additional trailer drops. Cupp testified that Food Fair had more drops than the other companies, but he admitted that they had more even before these negotiations commenced. He also testified that as a result of these negotiations Food Fair ultimately had to put on an additional twenty men, costing between $75,000 to $80,000 annually. Kramer (R. 2110a *et seq.*) of Rabiger-Kramer, Inc., contract carriers for A&P, testified that under the contract negotiated by Cohen's predecessor, Crumbock, his company had been entitled to no trailer drops. Until the new negotiations in 1954, they were allowed twenty-five drops, but after the 1954 negotiations his company was allocated fifty drops (R. 2116a). Food Fair had 283 drops before the June 1954 negotiations; afterward, they still had 283 drops but had to hire an additional twenty men.

Gannon (R. 2132a *et seq.*), president of Motor Transport Labor Relations, negotiated with the Union on behalf of the food retailer companies. He dealt with Cohen, although Walker and Hartsough walked in and out during negotiations. Before the negotiations, Food Fair had 283 drops and afterward Food Fair still had 283 drops but had to put on twenty additional men. The other companies received a proportionate amount as a result of these negotiations. American Stores received fifty under these negotiations with the promise of reconsideration the following year.

This evidence had been offered by the Commonwealth in an attempt to justify an inference that Cohen gave favored treatment to Food Fair in return for allegedly favored financial treatments for him and Lapensohn. However, there was no testimony supporting the contention that Food Fair received any benefits, nor that the negotiations were a quid pro quo as to the financial transactions. There was also no testimony offered to show that this conduct was pursuant to any alleged conspiracy between the parties.

REASONS FOR GRANTING THE WRIT.[5]

From the pre-indictment proceedings until the refusal of the Supreme Court of Pennsylvania to review the case, petitioner has been hastened on his way to jail by rare and unusually hasty proceedings with complete disregard on the part of the Commonwealth and the State courts for his constitutional rights to a fair and orderly determination of his guilt. First he was indicted without a preliminary hearing—such as is customarily granted to all other defendants in Pennsylvania—and without any showing that there

5. Four of the other five defendants in this proceeding are filing a separate petition for writ of certiorari. Many of the reasons contained therein are equally applicable to this petitioner and are thus adopted as if incorporated herein.

was a necessity for dispensing with such a hearing as to him. Then he was forced to trial without being given a reasonable opportunity of guaranteeing the selection of a fair jury. He was thereafter convicted of a crime as to which the statute of limitations barred the prosecution, at a trial in which the presiding judge acted like an arm of the prosecutor. The conviction was based on mere suspicion and a mass of evidence none of which tended to show petitioner's complicity in the crime charged. After conviction, the trial court hastened him through the post-trial motions to reach its pre-conceived conclusion, then refused bail pending appeal (a rare event in Pennsylvania) and effectively cut short the normal time for taking an appeal. The appellate courts did nothing to correct these errors. First, the intermediate appellate court compounded the haste by refusing a short and reasonable continuance necessary to enable proper presentation of the appeal. Perhaps as a result of this that court in rendering its decision misinterpreted the evidence and arguments and then refused to hear reargument even though specific inaccuracies were pointed out. Then, even though many serious problems of constitutional law and criminal procedure were raised, and even though they were of such weight as to justify a dissent in the Superior Court, the Supreme Court washed its hands of the matter and refused to review the proceedings. Accordingly, these proceedings should be received to protect the constitutional rights of this petitioner (along with his co-petitioners), as well as to guarantee the very sanctity of constitutional criminal process in the Pennsylvania courts.

1. Petitioner Was Deprived of a Preliminary Hearing Before Indictment.

There can be no doubt in Pennsylvania that, absent extreme justification, defendants charged with conspiracy are entitled to a preliminary hearing. It is clear that there

had always been a common law right to such a hearing, subject to certain exceptional proceedings. This was discussed by the Supreme Court of Pennsylvania in *Commonwealth v. Hoffman*, 396 Pa. 491, 152 A. 2d 726 (1959), and cases cited therein. Such a right was recognized and delineated by the Pennsylvania legislature in the Act of May 14, 1915, P.L. 499, PA. STAT. ANN. tit. 42 § 1080, which provides that:

> "Hereafter, upon a preliminary hearing before a magistrate for the purpose of determining whether a person charged with any crime or misdemeanor against the laws, except murder, manslaughter, arson, rape, mayhem, sodomy, buggery, robbery or burglary, ought to be committed for trial, the person accused and all persons on behalf of the person accused, shall be heard if the person accused shall so demand."

Since the crime charged in this indictment was not one of the exceptions mentioned in the statute (as was the case in *Commonwealth v. O'Brien*, 181 Pa. Super. 302, 124 A. 2d 666 (1956), *appeal dismissed*, 389 Pa. 109, 132 A. 2d 265 (1957)), the petitioner had a positive legal right to such a hearing, unless it fell within one of the recognized common law exceptions. In *Commonwealth v. Green*, 126 Pa. 531, 17 Atl. 878 (1889), the Supreme Court of Pennsylvania enumerated the three common law exceptions to the requirement for a preliminary hearing. The first involves an investigation of matters of general public import, directed by the courts. The Commonwealth did not proceed under this exception here. In fact, the Supreme Court of Pennsylvania had already ruled that the alleged incidents were not such a matter of general public import. See *Petition of Grace*, 397 Pa. 254, 154 A. 2d 592 (1959). The second involves those cases where the Grand Jury takes notice of the offense from its own knowledge and observations. This was not the case here. The third exception involves those cases where the prosecutor prefers an indictment before

a Grand Jury when there is occasion for great haste or when the exigencies of the case and public interest reasonably require such procedure, which must be under the supervision of the court. This is the reason alleged in the case at bar.

It was argued by the other petitioners in the courts below that any haste or exigency resulted from the conduct or inaction of the District Attorney. This argument was rejected by the lower courts, and the validity of their decision is being argued by the other petitioners here. However, even if the danger of the running of the Statute of Limitations brought the cases of the other defendants within the exception, and whether or not that emergency is chargeable to the District Attorney, it is manifestly clear that *no emergency or reason for haste existed as to petitioner Lapensohn.*

Petitioner Lapensohn was not a resident of the Commonwealth from May 9, 1957 until July 3, 1958. This fact was known by the District Attorney and by the indicting Grand Jury, since it was contained in the very indictment found by the Grand Jury. Furthermore, Lapensohn had terminated his relationship with the Union on or about November 2, 1956, as the District Attorney and the Grand Jury knew. Accordingly, if his absence from the Commonwealth for 14 months tolled the Statute of Limitations for that period of time, then the Statute of Limitations would not have expired until January 1960. The District Attorney thus had four months in which to obtain a warrant, hold a preliminary hearing and present testimony to the Grand Jury relating to Lapensohn. If, on the other hand, his absence from the jurisdiction did not toll the Statute, as might have been shown at a preliminary hearing, then the statute would have run in November 1958 (two years after he terminated his relationship with the Union), and any indictment would have been invalid and should have been quashed.

Judge Gold, in his opinion approving the procedure utilized by the District Attorney, made no reference to the fact that Lapensohn's absence from the Commonwealth put him in a different position, even though this had been argued in a supplemental brief filed with the court. The argument was also made before the Superior court but was completely ignored by it in its discussion of the validity of the indictments found without preliminary hearings.

Thus, the deprivation of his right to a preliminary hearing seriously prejudiced Petitioner Lapensohn and deprived him of the protection accorded to all other defendants charged with similar crimes, thereby denying him of equal protection of the laws guaranteed by the Constitution.

2. Petitioner Was Deprived of a Fair Trial and a Fair and Impartial Arbiter.

This Court, as well as the Courts of Pennsylvania, has underscored the necessity of a trial judge maintaining an "atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding." *Glasser v. United States*, 315 U. S. 60, 82 (1942); see *Commonwealth v. Claiborne*, 175 Pa. Super. 42, 102 A. 2d 900 (1953); *Quercia v. United States*, 289 U. S. 466 (1933); *DiBona v. Philadelphia Transportation Co.*, 356 Pa. 204, 216, 51 A. 2d 768, 774 (1947).

Whether caused by the large amount of publicity adverse to the defendants before and during the trial, or by the efforts of counsel for the various defendants in attempting to protect to the fullest extent the respective and often adverse interests of their clients, the judicial atmosphere of the trial was strained from the very beginning. It is respectfully and regretfully submitted that during the trial the judge failed to act as an impartial arbiter, on a number of occasions even assuming the role of prosecutor, and abandoned his duty of seeing that the trial was "conducted with solicitude with the essential rights of the accused." *Glasser v. United States, supra*, 315 U. S. at 71. This was demonstrated by rulings of the trial judge which not only

were consistently adverse to defendants, but were frequently accompanied by derogatory comments directed against defense counsel and their tactics. On many occasions the trial judge became an advocate, cross-examining witnesses, suggesting inferences not necessarily based on facts, making unfair comments on evidence, and finally rendered an argumentative charge. It was accordingly no surprise that the jury rendered a verdict of guilty as to all six defendants, after deliberating little more than one hour, even though the testimony had taken more than ten weeks and more than 1,100 exhibits were introduced, and even though the evidence was entirely circumstantial.

Even though counsel represented divers, and even adverse interests—so adverse in fact that under recent decisions of the Pennsylvania Supreme Court, it would have been reversible error for one counsel to represent more than one defendant: see *Commonwealth v. Meehan*, 409 Pa. 616, 187 A. 2d 579 (1963); *Commonwealth ex rel. Whitling v. Russell*, 406 Pa. 45, 176 A. 2d 641 (1962)—nonetheless, the trial judge on a number of occasions criticized counsel for failure to agree and for failure to cooperate.[6]

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6. Several examples follow:

"The Court: Ladies and gentlemen, I have just wasted another half-hour. You are excused until two o'clock, for lunch." (R. 1545a)

"Gentlemen, you will have to get together. I will not be put in the position where some of you insist on one thing, some of you urge exactly the opposite. That, I think, is something that, as a trial judge, I am entitled to insist upon." (R. 1552a)

(This occurred in chambers.)

"The Court: Gentlemen, gentlemen, gentlemen, we will proceed and prove it in the way you are doing. This division among counsel makes such agreements impossible." (R. 1586a-87a)

"Gentlemen, may I say this, that I realize team work is not easy, whether there is integration of effort or interlocking of effort, but one of you gentlemen objects to an answer and when the objection is sustained, and the answer ordered stricken, another one of the group wants to bring out the same information on cross-examination that I sustained an objection to when it

On a large number of occasions, some out of the presence of the jury, but mostly within the hearing of the jury, the defense counsel was criticized or objections made by the defense were belittled. For example, the Court frequently referred to objections by defense counsel as being "without merit" or "completely without merit" (*inter alia*, R. 1524a, 1549a, 1578a, 1626a, 1646a, 1649a, 1651a, 1723a, 1744a, 1984a, 2764a, 2800a).

The Court commented in the presence of the jury about defense counsel's "pointless repetitive asking of the same question over and over again" (R. 1952a). Other belittling, facetious or sarcastic comments about defense counsel's objections are set forth:

> "The Court: The thing I am amused at, and I suppose I am entitled to be amused, is that two minutes ago Mr. Witkin got a crown of glory for waiving a technical objection, and two minutes later he makes the same objection." (R. 1582a-83a)

> "The Court: Gentlemen, this is a mountain over a mole hill—it is trying to make a mountain out of a mole hill, to get my analogies, and I have already ruled on it." (R. 1692a)

> "The Court: My regrets. No better success. The objection is overruled." (R. 1693a)

> "Mr. McLaughlin: . . . And I submit to Your Honor, all of these answers have been inflammatory, prejudicial, and everything else that I can think of, to the rights of the defendant Elco."

> "The Court: You mean you have run out of adjectives?" (R. 1739a)

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was brought out on direct examination. I think it cannot help but confuse the record, and very possibly confuse the jury. They might well be wondering why I refused to permit it when one person asked it, and permit it when a different person asked it, and permit it when a different lawyer asked it." (R. 1749a-50a)

Similar comments can be found sprinkled liberally throughout the trial.[7] On a number of occasions the Court commented on the lack of good faith or frankness of defense counsel (R. 1663a, in open court; R. 1869a, 3675a-76a, in chambers or side bar), while on the other hand in front of the jury he praised the District Attorney on his good faith and integrity (R. 1742a).

On many occasions during the course of the trial, the court gave unsolicited assistance to the prosecution by examining witnesses to counteract the effect of cross-examination, by eliciting inferences favorable to the prosecution, and by sustaining objections that were not even made. For example, when a witness was asked a question by defense counsel without objection from the District Attorney, the court stated:

> "The Court: Do I hear an objection? If so, I will sustain it.
>
> "Mr. Specter: I object, Your Honor.
>
> "Mr. Witkin: If Your Honor please, all right.
>
> "The Court: Of my motion, sua sponta, to use the Latin, I hold that as an improper question and won't permit it.
>
> "Mr. Witkin: If Your Honor please, I move for the withdrawal of a juror.
>
> "The Court: That again, is denied." (R. 1971a-72a)

At a later point, where the testimony relating to the cashing of checks which the Commonwealth tried to show represented diverted funds, the Court on its own motion instructed the jury that, "There is no obligation on the Commonwealth to produce these fellers. It is a perfectly

7. See: R. 1655-56, 1735, 1854, 1903-04, 2041, 2062, 2109, 2404, 2415, 2751-54, 2793-95, 2807, 2830, 3015, 3083, 3142, 3148-49, 3182, 3185, 3191-94, 3200, 3678-80, 3727, 3761, 3790-91, 3894-95, 4182-83.

proper question to ask. But I am also saying that there is no obligation on the Commonwealth to do so" (R. 2604a). At another point the Court volunteered to sustain an objection that the Commonwealth did not even want to make (R. 3011a). On another occasion the Court, without any objection by the District Attorney, made an objection and then sustained himself (R. 3190a-92a). Again, without any objection from the District Attorney, an objection was sustained and an answer stricken from the record on the Court's own motion (R. 3207a-08a).

On two occasions the Court cross-examined witnesses to minimize the effect of cross-examination by defense counsel and to rehabilitate their testimony. For example, during cross-examination of the hand-writing expert witness, Cadigan, the following colloquy took place:

"By Mr. Witkin:

Q. At any rate—leaving that subject—we can agree that you have absolutely no testimony to offer in this case that this signature, 'Jerome S. Friedman' was written by any one of the three persons whose names I have mentioned, to wit, Ben Lapensohn, Ray Cohen and Joe Grace. That is correct, isn't it?

A. Yes, sir.

By The Court:

Q. Is it equally correct, sir, to say that you are unable to say that it was not written in the handwriting of any of those three people?

A. That is correct, sir." (R. 1625a)

During cross-examination of the witness Patterson, the following took place:

"By The Court:

Q. Mr. Patterson, did you ever get more than $30, regardless of how much you did get, what the slips said —did you ever get more than $30?

A. Well, right off hand, Your Honor, I can't recollect to it.

Q. You don't remember ever getting more than $30. Is that right?

Mr. McLaughlin: If Your Honor pleases, he didn't say that.

A. I don't recollect to it. I can't remember that far back." (R. 2421a)

During examination of the witness Gorman, the Court called the jury's attention to, and highlighted portions of the signed statement of the witness (R. 347a), normally a function of the District Attorney.

During the course of the trial the judge consulted with several witnesses off record and without the presence of defense counsel, but in the presence of the jury (R. 2766a-67a, 2790a-94a, 2990a). Yet, on another occasion the Court sarcastically commented about one defense counsel talking with a witness without drawing objection from other defense counsel (R. 3142a).

In another instance, the trial judge interrogated two prospective witnesses, Robert Lazovitz and Morris S. Marshall, with their counsel and the District Attorney present, but excluded the defendants and their counsel from the conference. During the course of the conference, a portion of which was transcribed stenographically, the judge even instructed the District Attorney as to what questions he would allow the District Attorney to ask (R. 2688a-2706a). Not only was this in itself prejudicial, but the prejudice was compounded by the fact that these witnesses, through their attorney, had previously informed the District Attorney that they intended to assert their privilege against self-incrimination. This type of conduct has been severely criticized, particularly where the evidence is not essential to the case, or where a witness was not called in good faith. See *Namet v. United States*, 373 U. S. 179,

10 L. ed. 2d 278.(1963), and cases cited therein. Although there is no evidence that the witnesses were not called in good faith, their testimony was certainly not essential to the case.

Furthermore, during the course of this trial, the trial judge noted that he had made some inquiries and investigations concerning a witness now on the stand, Mrs. Battisfore. The Court referred to matters which "You do not know, but I do know, that in my opinion she was seriously threatened last night by people who are not strangers to you, and I could not think of making her address available for fear for her safety" (R. 3522a). The Court refused to divulge the nature of that information. There is absolutely no evidence supporting any implication of impropriety or in any manner connecting appellant or any other defendant with such sinister conduct as hinted here. At any rate, such extra-judicial investigations and exposure of the judge to information not in the record, has been strongly criticized, even where the information related only to a witness rather than to a defendant. See *Chrisos v. United States*, 291 F. 2d 535 (7th Cir. 1961). Also see *Smith v. United States*, 360 U. S. 1 (1959); *Smith v. United States*, 223 F. 2d 750 (5th Cir. 1955); *Stephan v. United States*, 133 F. 2d 87 (6th Cir. 1943); *McFadden v. United States*, 63 F. 2d 111 (7th Cir. 1933).

Although it is not suggested that the trial court's conduct reached the depths of judicial intemperance so strongly criticized in *Commonwealth v. Claiborne*, 175 Pa. Super. 42, 102 A. 2d 900 (1953), nonetheless there was an "air of hostility" pervading the trial which prevented the defendants from receiving a fair trial. See *United States v. Standard Oil Co.*, 316 F. 2d 884, 895 (7th Cir. 1963). The remarks of the Circuit Court in the following case, cited in *Standard Oil*, while addressed specifically to a Federal trial, are equally applicable to State courts:

> "The judge conducting a jury trial in a Federal Court is more than a 'mere moderator'; he is 'the gov-

ernor of the trial for the purpose of assuring its proper conduct' . . . He has the prerogative, and at times the duty, of eliciting facts he deems necessary to the clear presentation of the issues. To this end he may examine witnesses who testify, and even call witnesses on his own motion. . . .

In eliciting facts, however, and in attempting to expedite the trial, and in furtherance of justice, *the judge must be careful to preserve an attitude of impartiality, and to guard against giving the jury an impression that the court believes the defendant is guilty.*" *United States v. Fry*, 304 F. 2d 296, 298 (7th Cir. 1962). (Emphasis supplied.)

In the case at bar the trial judge did not preserve an attitude of impartiality and could not fail but to give the impression to the jury of his belief in the guilt of the defendants. This air of hostility went so far as to apply not only to the defendants, but to a witness who was an officer of the same Local, Edward Battisfore. When that witness, the president and business agent of the Union, was called to testify about, and to identify, books and records of the Union (even though he was not their custodian, as the District Attorney well knew), he was unable to identify them. The Court interrupted his testimony and instructed one of the defense counsel to call the witness' attorney to the court room. Thereafter, in a conference (out of the hearing of the jury and of the witness), the trial judge expressed a belief that the witness was lying and announced that he was considering sitting as a committing magistrate to hold the witness for perjury. This was communicated to the attorney for the witness, who was thereafter instructed not to tell the witness what had been said, since he "might be unduly influenced to tell the truth" (R. 2785a).

The effect of all of this was not only to cause undue pressure and coercion on the witness, but was to convey graphically to the jury that the witness was not telling

the truth. Since he was an officer of the Union, and apparently a friend of the defendants, this incident made it appear as if it was an attempt on the part of the defendants to obstruct justice.

Although the subject matter of the testimony was relatively unimportant, and the testimony, in and of itself, of the witness, even after the implicit coercion, did not damage the defendants, the effect of the Court having told the witness not to leave the court room, to step down and stay here was devastating, and highly prejudicial to appellant and the other defendants.

Perhaps the most serious error by the trial judge in the conduct of the case, arising from his apparent hostility toward the defendants was his stringent limitation on cross-examination.[8] In connection with this, defense counsel was prevented from cross-examining witnesses concerning notations on stubs in check books which had been offered in evidence. See, for example, *Gretzinger* (R. 1621a, 1692a-1693a, 3011a-3012a); *Conlan* (R. 2554a); *Cadigan* (R. 2558a-2559a); *Flanagan* (R. 3394a-3395a; 3923a *et seq.*). Even though the Court based its ruling particularly on the fact that the books had not been authenticated, and despite the District Attorney's unfulfilled promise to do so, the Court permitted the District Attorney to ask such questions of Marjorie Battisfore (R. 3450a *et seq.*). This improperly impaired the cross-examination while permitting the prosecution to present improper testimony on direct examination.

The trial judge also refused to permit cross-examination of Marjorie Battisfore as to her address, which was desired for the purpose of determining a possible motive for prejudice. This was clearly error. *Alford v. United States*, 282 U. S. 687 (1931). The Court also restricted examination of Flanagan concerning minutes of the

8. See, for example: R. 1611-12, 1951, 1955, 1963-64, 2069-73, 2164-69, 2928, 2932-34, 2959-62, 2963-64, 2993-94, 3065, 3089-91, 3177-78, 3251, 3394-95, 3463-67, 3518-26, 3527, 3560-62, 3765-67, 3807-09, 3812-13, 4038-39, 4138-43, 4154, 4166, 4171-72a.

Union's meeting in an attempt to determine whether they reflected an authorization of expenses which had been testified to by the witness (R. 4038a-4039a).

Although the scope of cross-examination is a matter for the discretion of the trial court, limitations on the right of cross-examination, far less stringent than involved here, have been criticized by this Court, as well as by the courts of Pennsylvania. See *Alford v. United States*, *supra*; *Kaplan v. Loev*, 327 Pa. 465 (1937); *Lenahan v. Pittston Coal Mining Co.*, 221 Pa. 626 (1908); *cf. Commonwealth v. Petrofsky*, 194 Pa. Super. 94, 166 A. 2d 682 (1960). Also see *United States v. Standard Oil Co.*, 316 F. 2d 884, 892 (7th Cir. 1963).

These were not mere isolated incidents which occurred during the course of the lengthy trial. The reading of the record of this trial will show that from beginning to end the petitioner and his co-defendants had an opponent, not an impartial arbiter, presiding on the bench. The only answer given by the Superior Court was the two-pronged statement at the end of its opinion that the trial judge maintained his composure, and that the evidence was sufficient to justify the convictions of all of the appellants and they received a fair trial (Appendix C, page 36a). It is respectfully submitted that the constitutional test of whether petitioner received a fair trial is not founded upon the trial judge's ability to maintain his composure, nor upon the quality of the evidence. The test is whether petitioner received a trial free from prejudice conveyed by the trial judge to the jury. It is respectfully submitted that petitioner here was deprived of such a fair trial as guaranteed by the Constitution.

3. Petitioner Was Deprived of Effective Assistance of His Counsel.

The inordinate haste with which petitioner was rushed from conviction to ineffectual but final review by the appellate courts is not typical of cases in Pennsylvania, in any other state in this union, or in any nation following

Anglo-Saxon principles of jurisprudence. For the trial court to require counsel to file, brief and argue post-trial motions within one month, after completing a trial lasting more than ten weeks, without adequate opportunity to review the notes of testimony covering more than 4,500 pages, and without opportunity to tend to office affairs, constitutes unusual pressure on counsel. To compound this by refusing bail, thereby compelling the taking of an immediate appeal rather than permitting utilization of the 45 days normally permitted by rule of Court, is to add insult to injury. For the Superior Court then to refuse a continuance and to require filing of briefs *without having a printed record available, and without even seeing the trial court's opinion*, is virtually to deprive petitioner of his counsel's services. For the Supreme Court of the State thereafter to refuse to review the proceedings, even though issues raised were substantial enough to obtain a dissent in the Superior Court, practically amounts to an abandonment of its judicial obligation.

To require counsel to attempt to prepare this trial and appellate proceedings under circumstances above set forth is to mock the constitutional requirement of assistance of counsel under the Sixth Amendment as made obligatory upon States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U. S. 335, 342, 9 L. ed. 2d 799, 804 (1963). To sanction the proceedings followed by the trial and appellate courts here is equivalent to eliminating the requirement for representation by counsel at post-conviction stages. These stages are obviously no less important than the pre-trial stages so zealously guarded by this Court. *Escobedo v. Illinois*, U. S. 12 L. ed. 2d 977 (1964); *Massiah v. United States*, U. S. 12 L. ed. 2d 246 (1964); and cases therein cited.

4. Petitioner Was Convicted of a Crime Barred by the Statute of Limitations.

The dissenting opinion of Judge Watkins in the Superior Court succinctly sets forth the failure of the Common-

wealth to prove that an overt act took place within the statutory period of time. The crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, since that determines the duration of the conspiracy and whether the act relied upon as an overt act may properly be regarded as in furtherance of the conspiracy. *Grunewald v. United States*, 353 U. S. 391 (1957). Here it is clear that the scope of the agreement charged did not encompass the division of spoils. Thus, the last possible overt act in connection with the conspiracy charged was the *issuing* of the checks on September 16, 1957, not their cashing. The theory of the Commonwealth was that, as part of the conspiracy to cheat and defraud the Union, the defendants drew checks for more money than they actually later expended for legitimate convention expenses (noting that Lapensohn was not involved in this at all). Under this theory it was the drawing of the checks which was the significant last overt act in *furtherance of the conspiracy*. The later actual spending of the money for convention expenses clearly could not be in furtherance of the conspiracy since the more they spent the less there would be for their own personal use, and the expenditures would thus be in derogation of such a conspiracy. Likewise, pocketing of the proceeds would not represent part of a conspiracy, since the conspiracy alleged did not embrace the division of spoils. See *United States v. Bonnano*, 285 F. 2d 408 (2d Cir. 1960). The cashing of the checks was not part of the conspiracy charged, but represented the consummation of the substantive crime. If the checks had never been cashed, certainly the Commonwealth would still have charged that drawing them would be an overt act extending the conspiracy.

The majority of the Superior Court included only that the jury could infer that Joseph E. Grace received of his check on September 19, 1957, the date of the bank stamped on the reverse side. However, as the dissenting opinion points out, this would not be an inference but "pure guess-

work" since there was no evidence that it was paid to Grace, but could have been paid to anyone, since it was a bearer instrument.

If then, the statute of limitations had run, would this help petitioner Lapensohn, who was out of the jurisdiction for fourteen months? First of all, there was no proof that even though Lapensohn was out of the jurisdiction, he was not available for service of process. This proof is required in Pennsylvania; see *Commonwealth v. Turner*, 176 Pa. Super. 32, 107 A. 2d 136 (1954); *cf. Commonwealth v. Dunnick*, 32 Pa. D. & C. 2d 257 (Q. S. York Cty. 1963). However, even if the statute of limitations had tolled for fourteen months against Lapensohn, if the statute of limitations ran against other defendants, appellants could not be tried on the crime charged, since he could not be found guilty of conspiring with himself. See, REIMEL, CRIMINAL LAW (1958), page 64, esp. cases cited at fn. 25.

For the state courts to permit a conviction to stand where the statute of limitations had run on the crime charged would be to deprive these defendants of the protection of the laws accorded to all other defendants in the Commonwealth, without any reasonable distinction. Since the Supreme Court of Pennsylvania has not seen fit to resolve this issue, only this Court can determine whether the Constitutional rights of this petitioner and his co-defendants have been abrogated and can prevent the denial of equal protection of the laws.

5. Petitioner Was Prevented From Obtaining Selection of a Fair Jury.

The appellate courts of Pennsylvania have concluded that there is no constitutional right to any peremptory challenges. *Commonwealth v. Giambrone*, 183 Pa. Super. 283, 130 A. 2d 255, 261 (1957); *Commonwealth v. Antico*, 146 Pa. Super. 293, 22 A. 2d 204 (1941); *cf. Commonwealth v. Bubna*, 357 Pa. 51, 53 A. 2d 104 (1947). However, the legislature has provided for six peremptory challenges for

the defendant and six for the Commonwealth in trials for misdemeanors. Act of March 6, 1901, P. L. 16, PA. STAT. ANN., tit. 19, § 811. Although this right is legislative in character, neither the legislature nor the court acting under a statute could arbitrarily deprive some defendants of the right while granting it to others.

The legislature has also provided that in cases of joint trials the accused shall have the right to the same number of peremptory challenges to which either would be entitled if separately tried and no more. Act of March 31, 1860, P. L. 427, PA. STAT. ANN. tit. 19, § 785. The trial court interpreted this to entitle the six defendants to a total of six challenges. The defendants requested some additional challenges, but were limited to a total of six for all.

The Pennsylvania courts have held the allowance of more than required by statute could not be considered prejudicial so as to require a new trial. *Commonwealth v. Giambrone, supra.* Here it is respectfully submitted that the refusal of the court to grant *any* additional challenges was not only an abuse of its discretion but also deprived these appellants of equal protection of the law by preventing them from effectively exercising the right to peremptory challenges granted to defendants in other trials. As happened here, counsel for the various defendants, representing adverse interests, could not effectively agree upon the exercise of their right to challenge. Thus, it was possible for one counsel to utilize more than his proportionate share of the challenges, thereby depriving counsel for some of the other defendants from exercising *any* challenges. It is not contended that each defendant should have been entitled to six challenges, but, as in the *Giambrone* case, *supra*, the trial court should have granted *some* extra challenges. Failure to do so effectively deprived the defendants of their right to guarantee selection of a fair jury.

In addition, the court seriously limited the scope of voir dire of prospective jurors. For example, attempts by counsel to determine whether prospective jurors had formed

any opinion about the case, or about the guilt of the defendants, were blocked, with the judge ruling that the respective jurors could be asked only whether they had formed a *fixed* opinion. Even if it would not have been grounds for a challenge for cause that the juror had formed an opinion which was not a fixed opinion, still the question was proper to enable counsel to determine whether or not to exercise a peremptory challenge.

Because of this severe limitation on voir dire, coupled with the limited number of peremptory challenges, defendants were unable to guarantee a selection of a fair jury. The selection of the jury under this procedure was like playing poker blindfolded. Petitioner was accordingly denied his constitutional right to selection of a fair jury.

6. There Was No Evidence Supporting a Finding That Petitioner Committed the Crime Charged.

Since the classic cases in this Court of *Garner v. Louisiana*, 368 U. S. 157, 7 L. ed. 2nd 207 (1961); *Thompson v. Louisville*, 362 U. S. 199, 206, 4 L. ed. 2nd 654, 659 (1960); *cf. Cole v. Arkansas*, 333 U. S. 196, 201, 92 L. ed. 644, 647 (1948), it is clear that this Court will review the record to determine whether the conviction is so totally devoid of evidentiary support as to render it unconstitutional under the due process clause of the Thirteenth Amendment.

It is respectfully submitted that, despite testimony taking more than ten weeks to present and the introduction of almost 1,100 exhibits, the record is completely devoid of any evidence supporting a finding that petitioner was in any manner connected with a conspiracy to cheat and defraud the Union or its members of their moneys, goods, chattels, and other property.

It is respectfully submitted that all of the testimony fails to prove the existence of any conspiracy between or among any of the defendants. In fact, no evidence was ever offered on two essential elements of the crime

charged—namely, there is absolutely no proof that any of the expenditures or conduct charged to the defendants were not authorized by the full membership of the Union, in complete conformity with its by-laws and constitution; nor was there any iota of evidence offered to show that any of the defendants knew that there was no such authorization. Furthermore, there was not one shred of evidence that any diversion of funds was part of any conspiracy, much less the specific conspiracy charged. Finally, there was not one word of proof—much less proof beyond a reasonable doubt—that any of the defendants personally participated in any unlawful diversion of funds or benefited thereby. There was no proof that any one of them forged checks, personally altered any vouchers, nor is there any credible evidence that any one of them personally received any funds intended for anyone else or for any other purpose. In short, each of the twenty incidents set out in the statement of facts, *supra*, was itself innocent, or at least not probative of the offense charged.

But more important, as to petitioner Lapensohn specifically, there was not one scintilla of evidence connecting him with any conduct embraced by the crime charged in the indictment. *The first four incidents, relating to the alleged seizure of control of the Union and reimbursement of expenses, all occurred before petitioner Lapensohn was employed by the Union.* There was no evidence offered to show that he in any way participated in any of the incidents, or joined in any common plan. Absolutely the only evidence offered by the Commonwealth to support his connection was the alleged innocuous statement by petitioner Lapensohn to Louis Stein, an officer of Food Fair, that Lapensohn had been the sponsor of Cohen during the election (R. 2194a). There was no evidence that this statement, made long after the event and apparently in an attempt to impress someone, had any foundation in fact or was more than a self-serving statement at that time. Even if taken at face value, to support a man's election is mani-

fectly not equivalent to conspiring with that person to commit an illegal act, even if the elected person were to commit an illegal act after taking office. There was not one shred of evidence that Cohen had any improper motives at the time he sought election, nor is there a hint that even if he had, Lapensohn knew of such motives and approved of them and supported him for such purpose.

Of the next ten incidents, relating to alleged diversion of Union funds, *several took place after petitioner Lapensohn's connection with the Union terminated.* These included the international convention in Miami, the clothing purchases, and the Gallagher strike payments. As to the Horn & Hardart strike payments, there was not the slightest suggestion that Lapensohn had any connection with the incidents. In fact, the evidence was ruled by the judge as immaterial with relation to him. There was no evidence offered to show any diversion of funds intended for insurance payments. In fact, the evidence showed that all such payments were made. There was no evidence offered as to whether or not the items covered by such insurance were proper under Union by-laws and constitution; even if they were not proper, there was no evidence offered to show that Lapensohn, the insurance broker on the policies, knew they were unauthorized. Additionally, there was no evidence showing this was part of a conspiracy.

The circumstantial evidence relating to the alleged diversion of checks drawn to Katz, Kanner, Kirsch and Marshall & Co., was not sufficient to show Lapensohn's participation in the conspiracy charge. The mere fact that he cashed checks of similar denominations on the days that these checks were cashed does not prove that the funds were diverted to him, that they were unauthorized, nor that it was part of any conspiracy as charged. To permit a conviction to stand on such flimsy circumstantial evidence would amount to conjecture.

The payment to Mastrin clearly did not belong in this case. Mastrin testified that the money he gave to

Lapensohn was his own. It was paid to him for services rendered to the Union. There was no suggestion by the Commonwealth that the services were not rendered or that the services were not worth the amount charged. What he did thereafter with his money has nothing to do with a conspiracy to cheat the Union or its members. Even if this evidence were interpreted to constitute a "kick-back," as the Commonwealth seems to suggest, this does not constitute the crime charged in the indictment. In fact, to permit this testimony was palpable error, since it could only constitute proof of a crime not charged in the indictment.

The next five incidents, showing financial transactions between the defendants, cannot by any stretch of the imagination, constitute proof of the conspiracy charge. The fact that petitioner Lapensohn received pay checks, or even some other payments which may be unexplained or unsupported by vouchers, does not prove his complicity in a conspiracy to cheat and defraud the Union. Even if he had financial transactions with other defendants, there is nothing illegal about that. Setting aside the completely arbitrary manner in which defendant Cohen's allegedly unexplained resources were proved—based on an arbitrary period of time, charts not substantiated by evidence, and conclusions of alleged experts founded upon information not in evidence—this does not in any manner tend to prove the specific crime charged. The Commonwealth's conjecture that Cohen received the proceeds and diverted funds is no more supported by evidence than the conjecture that Cohen had some other legal or illegal source of funds.

In short, to permit a conviction to stand on such conjecture would guilt by the remotest association with suspicious, but not guilty, incidents.

The final incident relating to trailer drops has not the remotest relationship to any crime at all, much less the crime charged in the indictment. First of all, the evidence shows that *Food Fair did not receive favored treatment,*

but instead had to put on additional men at a considerable cost in order to maintain the position it held prior to the negotiations by defendant Cohen. This benefited the Union rather than harmed it. Even if the negotiations had resulted in harm to the Union, there is not the slightest evidence offered to show that this was part of a conspiracy. The mere fact that months later Lapensohn and Cohen, along with hundreds of other people, some connected with labor and many other walks of life, were offered favorable financial treatment in connection with stock interests of Food Fair, does not remotely tend to prove complicity in the crime charged. Even the Superior Court of Pennsylvania, in affirming the convictions, did not demonstrate how each of these incidents tended to prove the specific charge contained in the indictment. The Superior Court merely sets forth the summary of the evidence, in many instances misinterpreting the facts or drawing inferences not justified by the facts, and simply concludes that the evidence was sufficient to sustain the convictions. There was absolutely no statement in the opinion supporting its conclusion that the defendants entered into a continuing conspiracy, that in the execution of their scheme they planned and did gain control of the Union and its treasury, that they extended their domination by replacing key officials and proceeded to loot the Union treasury by various devices (Appendix C, page 8a). Even in Pennsylvania to sustain a conviction of conspiracy there must be proof of a combination of two or more persons with criminal intent or corrupt motives to do a crime or an unlawful act, or an act by criminal or unlawful means. *Commonwealth v. Horvath*, 187 Pa. Super. 206, 144a 2nd 489, 491 (1958); *Commonwealth v. Gaines*, 167 Pa. Super. 485, 75a 2nd 617 (1950); *Comonwealth v. Ricci*, 177 Pa. Super. 566, 112a 2nd 656 (1955). The evidence in the case at bar may have taken longer to present than it did against "Shuffling Sam" (*Thompson v. Louisville, supra*), but it was no more substantial.

CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the petition of the other defendants in this case, which are adopted herein where applicable, in order to protect the constitutional rights of petitioner and his co-defendants, and to decide questions of grave import to the administration of justice in the states, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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SUPREME COURT, U.S.

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964.

No. 420

RAYMOND COHEN,
JOHN JOSEPH ELCO,
JOSEPH E. HARTSOUGH,
ABRAHAM D. BERMAN,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

RAYMOND COHEN, JOHN JOSEPH ELCO, JOSEPH E. HARTSOUGH AND ABRAHAM D. BERMAN,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Above, the Chief Justice and the Associated Justices of the Supreme Court of the United States:

RAYMOND COHEN, JOHN JOSEPH ELCO, JOSEPH E. HARTSOUGH, and ABRAHAM D. BERMAN respectfully petition by their counsel, ABRAHAM J. BREM LEVY, EDWARD DAVIS, JOHN PATRICK WALSH, JOHN ROGERS CARROLL, BERNARD L. LEMISCH and RAY E. MACHEN, for a writ of certiorari to review a decision of the Supreme Court of Pennsylvania rendered May 27, 1964, which denied petitioners an appeal from the Superior Court of Pennsylvania which affirmed a judgment of conviction of conspiracy of the Quarter Sessions Court of Philadelphia, Pennsylvania.

CITATIONS TO OPINIONS BELOW.

The opinion of the trial court (supplemental record) is unreported.

The opinion of the Superior Court of Pennsylvania printed in the Appendix "C" hereto (p. 3a) was handed down March 19, 1964, and is reported in — Pa. Superior Court —, 199 A. 2d 139, dissent page 159.

The order of the Supreme Court of Pennsylvania is unreported and printed in the Appendix "A" hereto (p. 1a).

JURISDICTION.

The judgment (order) of the Supreme Court of Pennsylvania was entered on May 27, 1964, Appendix "A" hereto (p. 1a). The jurisdiction of this Court is invoked under 28 U. S. C., § 1257(3).

QUESTIONS PRESENTED.

1. Whether action by a state court compelling defendants in a state criminal case to be tried on an indictment found by a grand jury on a district attorney's bill, petition for which discloses no emergency but only the risk of the expiration of the state Statute of Limitations, where the delay was occasioned by the district attorney's lack of due diligence, violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution?

2. Whether action by a state court where defendants were called for trial on a charge of conspiracy (misdemeanor) and where the court sequestered the jury immediately after it was completed after having instructed the panel from which it was chosen that there was but a remote possibility that at some later date it might be necessary to lock them up in the interest of justice; restricted all six defendants to but six peremptory challenges (collectively); admitted testimony and exhibits of an inflammatory nature;

and injected itself into the trial of the cause in a manner most prejudicial to the defendants; violates the due process clause of the Fourteenth Amendment to the Federal Constitution?

3. Whether a state court's action (Superior Court of Pennsylvania) in denying defendants' petitions for continuance on two separate occasions, where the defendants were compelled to file an immediate appeal from the judgment and sentence of the trial court (Quarter Sessions Court of Philadelphia) which refused to allow petitions for special supersedeas, violates the provisions of the Sixth Amendment to the Federal Constitution?

4. Did the admission of evidence of crimes not charged in the indictment violate the defendants' constitutional rights?

5. Have the Pennsylvania Courts interpreted the Statute of Limitations in such fashion as to deprive the defendants of due process of law because of vagueness?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are Section 1 of the Fourteenth Amendment containing the due process clause which provides:

> ". . . NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW . . ."

and the Sixth Amendment which provides:

> "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT . . . TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATIONS; AND TO BE CONFRONTED WITH THE WITNESS AGAINST HIM . . . AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."

STATEMENT.

Petitioners, five of six in number, were indicted on a charge of conspiracy to cheat and defraud. Prior to the action of the grand jury, the defendants had not been given a preliminary hearing, the indictment having been presented to the grand jury after a common pleas judge had granted the district attorney's petition to proceed without a preliminary hearing.

Five days later, on September 23, 1959, upon being apprised of the indictment, the defendant Raymond Cohen surrendered to the district attorney under that indictment as returned by the September 1959 Grand Jury, and on the same day filed a petition for a writ of habeas corpus alleging illegal detention.

The writ of habeas corpus was, after hearing, dismissed and an appeal was taken to the Superior Court of Pennsylvania. That appeal was later withdrawn on a subsequent decision of the Superior Court in *Commonwealth, ex rel. D. Ward Nichols v. Lederer*, 193 Pa. Superior Ct. 482 (1960, affirmed by the Supreme Court of Pennsylvania, 404 Pa. 218 (1961)), which involved the same issue as in the then instant case, and which ruled that dismissal of a petition for a writ of habeas corpus was but an interlocutory order and not appealable because the petitioner still had available to him, on the same reasoning contained in the habeas corpus petition, the remedy of a motion to quash the indictment in the Court of Quarter Sessions where the case was scheduled to be tried, which remedy he was compelled to pursue.

Thereafter, a motion to quash the indictment was filed which after hearing by a court en banc was denied.

The matter came to trial on March 25, 1963, and the Commonwealth concluded the presentation of evidence on June 3, 1963, whereupon the defendants filed demurrers which the trial judge overruled. The defendants then rested and filed motions for binding instructions request-

ing the court to direct the jury to find the defendants not guilty, which was refused.

After conviction by the jury, the defendants filed motions and reasons for a new trial and in arrest of judgment which, after argument, were denied.

On July 15, 1963, the defendants were fined and sentenced to prison terms. The trial court refused to admit the defendants to bail pending the taking of an appeal; whereupon, defendants were compelled to perfect appeals to the Superior Court of Pennsylvania, a judge of which then granted supersedeas.

As a matter of Chronology, when the defendants were compelled to perfect appeals to the Superior Court (July 15, 1963) in order to remain at liberty pending the determination of the appeals, the cases were automatically listed for argument in the appellate court on September 9, 1963.

Two petitions praying for continuance were filed with the Superior Court (July 19, 1963, and August 13, 1963) which were peremptorily refused without hearing.

The Superior Court of Pennsylvania heard arguments on September 9, 1963, and on March 19, 1964, affirmed, one judge dissenting; and on April 14, 1964, refused a petition for reargument. Immediately thereafter, petitions for allowance of appeals from the Superior Court to the Supreme Court were filed, which, on May 27, 1964, without hearing or argument, were refused.

The question of the legality of a bill of indictment by the grand jury without a preliminary hearing; the circumstances surrounding the sequestration of the jury; the allowance of but six peremptory challenges to six defendants (collectively); the admission of inflammatory testimony and exhibits, and the court injecting itself into the case in a most prejudicial manner to the defendants, were all raised by counsel at the trial level; the denial of due process under the Fourteenth Amendment and the violation of the Sixth Amendment were raised by counsel at the trial level and in the appellate courts, by objections at the trial and on petitions to the appellate court.

REASONS FOR GRANTING THE WRIT.*

1. Action by a State Court Compelling Defendants in a State Criminal Case to Be Tried on an Indictment Found by a Grand Jury on a District Attorney's Bill, Petition for Which Discloses No Emergency But Only the Risk of the Expiration of the State Statute of Limitations, Where the Delay Was Occasioned by the District Attorney's Lack of Due Diligence, Violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution.

The decision of the trial court in refusing to grant motions to quash the bill of indictment and compelling the defendants to go to trial clearly violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Although "DUE PROCESS OF LAW" seems incapable of exact definition, it generally means law in the regular course of administration through the courts of justice in conformity to rules which throughout the years have been established to protect the individual's human rights. *Brown v. State of New Jersey*, 175 U. S. 772; *Pedigo v. Celanese Corporation*, 388 U. S. 937, 94 L. ed. 578.

The essential elements of due process are "NOTICE AND OPPORTUNITY TO BE HEARD AND TO DEFEND IN AN ORDERLY PROCEEDING ADAPTED TO THE NATURE OF THE CASE BEFORE A TRIBUNAL HAVING JURISDICTION OF THE CAUSE." *Carten v. Kubler*, 320 U. S. 243, 88 L. ed. 26; *Ohio Bell Telephone v. Public Utilities Comm. of Ohio*, 301 U. S. 292,

* Another defendant in this proceeding, Ben Lapensohn, is filing a separate petition for writ of certiorari. Insofar as applicable to these petitioners, the reasons contained in that petition are adopted by reference.

81 L. ed. 1093. While "THERE IS NO TABLE OF WEIGHTS OR MEASURES FOR ASCERTAINING WHAT CONSTITUTES DUE PROCESS." *U. S. v. Witmer*, 115 F. Supp. 19, affirmed 348 U. S. 376, 99 L. ed. 428; each factual situation must be closely examined to determine the applicability of the principle of due process.

This Court in *Betts v. Brady*, 316 U. S. 445, 86 L. ed. 1595, said "ASSERTED DENIAL (OF DUE PROCESS) IS TO BE TESTED BY AN APPRAISAL OF THE TOTALITY OF FACTS IN A GIVEN CASE."

In *Lisenba v. California*, 314 U. S. 219, the court insisted that due process is denied when there is a failure to observe that fundamental fairness essential to the very concept of justice; and in *Link v. Wabash R. Co.*, 37 U. S. 626, 8 L. ed. 2d 734, the court indicated that "THE FUNDAMENTAL REQUIREMENT OF DUE PROCESS IS AN OPPORTUNITY TO BE HEARD UPON SUCH NOTICE AND PROCEEDINGS AS ARE ADEQUATE TO SAFEGUARD THE RIGHT FOR WHICH THE CONSTITUTIONAL PROTECTION IS INVOKED."

In this case, fundamental fairness was completely and definitely lacking, and the defendants were denied due process of law when they were not apprised of the charge against them, having been denied a preliminary hearing where they could have heard the accusations, faced their accusers, been given an opportunity to cross-examine them so that they would then have been adequately conditioned to prepare a defense. The answer that a defendant had available to him the process of the court to demand and receive a bill of particulars falls far short of that which a defendant charged with crime is entitled to under the provisions of the Constitution of the United States, because a bill of particulars in most cases, after denial of a preliminary hearing, as happened here, does not adequately set forth the facts and circumstances surrounding the basis for the charge and cannot be substituted for a preliminary hearing.

In the Commonwealth of Pennsylvania it has been recognized since time immemorial that the normal, common, proper and just method of procedure of charging one with the commission of crime is by arrest, an adversary preliminary hearing in which the defendant can participate, a binding over to the Court of Quarter Sessions, and a bill of indictment returned by a grand jury based upon the return of a magistrate.

From the earliest days in the Commonwealth of Pennsylvania as indicated in the case of *Lloyd and Carpenter*, 3 Clark 188 (1845) followed by *Commonwealth v. O'Brien*, 181 Pa. Superior Ct. 382 (1956) persons charged with the commission of crime had the right to a preliminary hearing.

These cases were followed by *Commonwealth v. Hoffman*, 396 Pa. 491 (1959) where the Supreme Court of Pennsylvania made it clear, once and for all, that a defendant has the right to a preliminary hearing. The court in interpreting the Act of May 14, 1915, P. L. 499 (42 P. S. 1080) held that the petitioners were entitled to a preliminary hearing to which they had a positive legal right, and the denial of such a hearing made void all subsequent proceedings.

It is only in exceptionally special cases that a district attorney is warranted in presenting a petition to the court for permission to bypass a preliminary hearing and to proceed directly to the grand jury.

In this case, the defendants always insisted that there was no adequate reason given other than that which became crystal clear on a reading of the testimony that the reason was nothing more than the lack of due diligence on the part of the district attorney when he assigned as his reason for bypassing a preliminary hearing the risk of the expiration of the statute of limitations. This risk was created by the negligence and lack of due diligence of the district attorney. There was no real emergency in this case, and no need for such precipitous action, since several months prior to the date of the expiration of the statute

of limitations the district attorney testified that he was in a position to present the same case to the grand jury that he presented after allowance of the petition. If he had acted at the earlier time, when he was in possession of the same facts and evidence, the defendants would have been provided with a preliminary hearing at which they could have been present and afforded the safeguards guaranteed them by the constitution. Certainly the right to a preliminary hearing which the Supreme Court in the *Hoffman* case said was so vital and fundamental that the deprivation of such a hearing voided all subsequent proceedings.

Further, there is no allegation in the district attorney's petition, nor were any facts presented, that the public good demanded the filing of a district attorney's bill; since it has always been the law in the Commonwealth of Pennsylvania that the law officers of the commonwealth must always exercise their powers cautiously, generally under the direction of the courts, and never unless convinced that the general public good demanded it.

Where the crime charged is not directed at the public generally, then the basis for a district attorney's bill must be based on some act of the defendant, which had prevented their having had a preliminary hearing and which had created the risk of the expiration of the statute of limitations.

Here, the defendants had done nothing to cause the delay, have always been available, and should not have been treated differently from any other person charged with the commission of a crime.

2. Action by a State Court Where Defendants Were Called for Trial on a Charge of Conspiracy (Misdemeanor) and Where the Court Sequestered the Jury Immediately After It Was Completed After Having Instructed the Panel From Which It Was Chosen That There Was But a Remote Possibility That at Some Later Date It Might Be Necessary to Lock Them Up in the Interest of Justice; Restricted All Six Defendants to But Six Peremptory Challenges (Collectively); Admitted Testimony and Exhibits of an Inflammatory Nature; and Injected Itself Into the Trial of the Cause in a Manner Most Prejudicial to the Defendants Violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

Immediately upon the case going to trial, the court in addressing the panel from which the jurors were drawn, informed them that there was only a remote possibility at some later date it might be necessary to cause them to be locked up in the interest of justice and then immediately after they were selected and sworn, ordered them sequestered.

At the trial, the court acted in a manner most prejudicial to the defendants, and denied them a fair trial when it held meetings (excluding the defendants and their counsel) in chambers with witnesses for the commonwealth who had previously indicated they did not desire to testify and prevailed upon them to testify; when it refused to permit the cross-examination of a commonwealth witness (BATTISFORE) so as to place her in her proper setting (a situation most similar to *Alford v. United States*, 228 U. S. 682, where there was a reversal for this very reason); when it permitted the jury to view a number of out sized cardboard charts allegedly setting up in graphic form a visual statement of the defendant Cohen's alleged financial transactions. These charts were concerned only with an arbitrary period and were proved to be inaccurate, having been hastily prepared after a scanty and limited investigation. In *U. S. v. Holland*, 348 U. S.

121; this method of computing a person's assets was characterized as being fraught with danger for the innocent so that it called for the closest scrutiny by the court, a precaution not taken in this case, when the court ruled on defense counsel's objections in a sarcastic and antagonistic manner and characterized objections and motions made by counsel as being without merit, vain, completely without merit, accused counsel of being "LESS THAN FRANK" and sustained an objection after soliciting the district attorney to make one.

The defendants were denied due process and a fair trial when the court ruled that all of the defendants collectively (six in number), who were tried en masse, were entitled to only that number of peremptory challenges (six) which any one defendant was entitled to if tried alone, thereby prejudicing all the defendants by reducing the number of peremptory challenges from six, if each defendant was tried alone, to but one, and as it actually transpired upon the selection of the jury, to none, since each individual defendant did not get the opportunity to challenge any juror.

Although it is true that there is no constitutional guarantee of peremptory challenges in a criminal trial, once the legislature authorized peremptory challenges, then the constitutional guarantee of equal protection of laws under the Fourteenth Amendment to the Constitution of the United States comes into play.

The law is void if it operates in a discriminatory manner and denies equal protection of laws by prescribing different procedures in a case of persons in like situations.

Here, we have the situation where the legislature allowed six peremptory challenges to a defendant called for trial in a criminal case, but because he was there indicted with five other persons and brought to trial en masse he is, in essence, denied the right to himself peremptorily challenge six prospective jurors because the court allowed only that number to all defendants called for trial at the same time.

Wherefore, we respectfully suggest that Sect. 40 of the Act of 1860, P. L. 427, is unconstitutional and violates the defendants' rights as guaranteed and protected by the Fourteenth Amendment to the Constitution of the United States in that it deprived the defendants of due process and equal protection of laws. It violates and discriminates against persons of the same and designated class, committing the same crime or similar offense, by denying them an equal number of challenges when called for trial en masse.

3. A State Court's Action (Superior Court of Pennsylvania) in Denying Defendants' Petitions for Continuance on Two Separate Occasions, Where the Defendants Were Compelled to File Immediate Appeals From the Judgment and Sentence of the Trial Court (Quarter Sessions Court of Philadelphia) Which Refused to Allow Petitions for Special Supersedeas, Violates the Provisions of the Sixth Amendment to the Federal Constitution.

The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, and also that it is within the intendment of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States that when accused, a defendant shall be entitled to the assistance of counsel at all times, and that the denial of the effective assistance of counsel to one charged with crime violates due process. *Hawk v. Olsen*, 326 U. S. 271, 90 L. ed. 61; *Wade v. Mayo*, 334 U. S. 672.

This case came on for trial on March 23, 1963, and lasted ten weks and one day (March 23, 1963, to June 3, 1963), the jury returning a verdict of guilty on June 3, 1963, near midnight.

The court immediately disclosed a precise time table for motions and arguments to follow: all motions for a new trial and in arrest of judgment and all supplementary reasons were to be filed by June 17, 1963; briefs were to be

filed by July 3, 1963, and argument to be had on July 10, 1963. All motions were then denied and the defendants called in for sentence on July 15, 1963. Immediately upon sentencing, the defendants presented petitions for supersedeas which the court denied. That denial to grant supersedeas compelled the defendants to immediately file appeals to the Superior Court, thereby denying to them the forty-five days allowed by law to perfect appeals.

When the defendants were compelled, in order to remain at liberty under bail, to perfect appeals to the Superior Court on July 15, 1963, the matter was automatically listed for argument in the Superior Court of Pennsylvania on September 9, 1963.

If the provisions contained in the Sixth Amendment are to be taken seriously then it becomes apparent that the defendants were denied effective assistance of counsel when the trial court refused to grant supersdeas and compelled the perfection of appeals to the Superior Court on July 15, 1963. The error was then compounded by the Superior Court when it peremptorily refused to continue argument when appealed to for that purpose on two separate occasions.

Obviously, counsel for the defendants after a ten week and one day trial and the immediate preparation of motions, briefs and argument of the same within an additional five weeks, and the preparation of a brief and argument in the Superior Court within an additional two months (September 9, 1963), who were also called upon to carry on active law practices were not in the best condition, physically or mentally, to effectively present the matter to the best of their abilities.

4. The Admission of Evidence of Crimes Not Charged in the Indictment Violates the Defendant's Constitutional Rights.

The reason this Court should grant review on this issue is that the action of the courts below appears to petitioners to violate fundamental principles of constitutional law pre-

viously announced by this Court. This Court has held in *Cole v. Ark.*, 333 U. S. 196, and *De Jonge v. Oregon*, 229 U. S. 353, and *Stirone v. U. S.*, 361 U. S. 212, 4 L. ed. 2d 252, that:

> "No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard in the trial of the issue raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Cole, supra*)

In this case, the defendants were charged in a one-count indictment with conspiracy to cheat and defraud Local 107 of the Teamsters Union of its property. The trial court admitted evidence of such crimes as larceny, fraudulent conversion, embezzlement, extortion as well as threats of violence and a variety of other conduct some criminal and some merely suspicious, none of which was encompassed in the indictment. The defendants made seasonable objection, specifically stating the Fourteenth Amendment as a reason. This contention was considered and passed upon by all of the courts below.

5. The Pennsylvania Courts Have Interpreted the Statute of Limitations in Such Fashion as to Deprive the Defendants of Due Process of Law Because of Vagueness.

The reason this Court should grant review on this issue is that the Superior Court of Pennsylvania held that the Statute of Limitations for the crime of conspiracy to cheat and defraud runs from "not later than the time when the check should have been presented for payment", and "at the expiration of a reasonable time after delivery of the instrument".

The Court was referring to the fact that the last overt act shown in the evidence was that Joseph Grace (a defendant who died before trial) received on September 16, 1957

a check from Local 107 of which he was then President in the amount of $2,500.00, and that check was cashed by some unknown person on September 19, 1957. The indictment was not found until September 18, 1959. Petitioners believe that this interpretation of the Statute of Limitations places persons in indefinite jeopardy of conviction for offenses normally barred by the statute of limitations.

Petitioners believe that this decision is inconsistent with the principles announced by this Court in *Lanzetta v. N. J.*, 306 U. S. 451, and *Musser v. Utah*, 333 U. S. 95.

CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the Petition of Ben Lapensohn, your petitioners pray that a Writ of Certiorari issue directed to the Supreme Court of the Commonwealth of Pennsylvania to the end that this cause may be reviewed and determined, and that the judgment of the Supreme Court of the Commonwealth of Pennsylvania be reversed and for such other and further relief as may seem proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1964.

Nos. 419-420

BEN LAPENSOHN, *Petitioner in No. —,*
RAYMOND COHEN,
JOHN JOSEPH ELCO,
JOSEPH E. HARTSOUGH,
ABRAHAM D. BERMAN,
Petitioners in No. —,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

JOINT APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT.

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JOINT APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

APPENDIX A.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

MISCELLANEOUS DOCKET No. 13.

COMMONWEALTH OF PENNSYLVANIA

v.

ABRAHAM D. BERMAN, ET AL.

Petition of:

RAYMOND COHEN No. 135-A
JOHN JOSEPH ELCO No. 134-A
JOSEPH E. HARTSOUGH No. 137-A
ABRAHAM D. BERMAN No. 173-A
BEN LAPENSOHN No. 150-A

ORDERS ON PETITIONS FOR ALLOWANCE OF APPEAL.

May 27, 1964

Refused.

Per Curiam.

APPENDIX B.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT.

Nos. 273, 274, 275, 277, 278. OCTOBER TERM, 1963.

COMMONWEALTH OF PENNSYLVANIA

v.

ABRAHAM D. BERMAN, ET AL.

Appeal of:

RAYMOND COHEN in No. 273
JOHN JOSEPH ELCO in No. 274
JOSEPH E. HARTSOUGH in No. 275
ABRAHAM D. BERMAN in No. 277
BEN LAPENSOHN in No. 278

ORDERS ON PETITIONS FOR REARGUMENT.

April 13, 1964

Reargument refused.

Per Curiam.

APPENDIX C.

JUDGMENT AND OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

Opinion by ERVIN, *J.*

FILED: March 19, 1964

The six defendants, Raymond Cohen, John Joseph Elco, Joseph E. Hartsough, Edward F. Walker, Abraham D. Berman and Ben Lapensohn, have appealed from the judgment and sentence of the court below following a joint trial on a single bill of indictment charging them with conspiracy to cheat and defraud a union of its money, goods and property.

The district attorney, with allowance of the court below, presented a bill to the grand jury which, on September 18, 1959, was returned as a true bill. On September 25, 1961 the defendants filed a motion to quash the indictment on the ground that they had not been afforded a preliminary hearing before the presentation of the bill to the grand jury. The motion was denied by Judges SLOANE, GLEESON and MCCLANAGHAN. After a trial which lasted ten weeks and one day, the jury returned verdicts of guilty as to all defendants on June 3, 1963. A review of the record will reveal that the Commonwealth produced 98 witnesses and introduced 1116 exhibits. None of the defendants testified. No evidence was introduced on behalf of any of the defendants. After the dismissal of motions for new trial and in arrest of judgment and the imposition of sentences, these appeals were taken.

Several of the appellants argued that the court below erred in not quashing the indictment because of the absence of a preliminary hearing. It should be pointed out

that this question was not presented or argued in the post-trial motions filed in the court below. We will, however, consider this argument on the merits.

Upon review of an order to quash an indictment based on a special bill submitted under the supervision of the court, we will not set aside the action of the court below except for an abuse of discretion both manifest and flagrant, and in a clear case where we are convinced that harm has been done to the defendant by improper conduct that interfered with his substantial rights: *Com. v. Carey*, 201 Pa. Superior Ct. 292, 296, 191 A. 2d 730; *Rowand v. Com.*, 82 Pa. 405, 408; *Com. v. Ramsey*, 42 Pa. Superior Ct. 25, 32.

In *Com. v. Cody*, 191 Pa. Superior Ct. 354, 358, 156 A. 2d 620, we said: "Adherence to this practice [obtaining prior leave of court for a district attorney's bill of indictment] will obviate attacks on indictments returned without a preliminary hearing and previous binding over."

The evidence at the hearing on appellants' petition for a writ of habeas corpus[1] in the court of common pleas, established that the district attorney was confronted with an emergency which required utilizing the district attorney's bill of indictment. The district attorney's office had received certain leads from the United States Senate Committee investigating Local 107 in 1958 but Local 107 instituted an action in the United States District Court for the District of Columbia to prevent the Senate from turning over the original Local 107 records to the Philadelphia district attorney's office. Appeals were taken to the Court of Appeals for the District of Columbia and then a petition for a writ of certiorari was filed with the United

1. Petitions for writs of habeas corpus were filed on behalf of the defendants challenging the indictment because of the absence of a preliminary hearing. After hearings, the petitions were dismissed by the court below. Appeals were taken to the Superior Court but were discontinued after the decision in *Com. ex rel. Nichols v. Lederer*, 193 Pa. Superior Ct. 482, 165 A. 2d 711, affirmed per curiam 404 Pa. 218, 172 A. 2d 319.

States Supreme Court. It was not until January of 1959 that the original records were turned over to the district attorney. William V. Suckle, the assistant district attorney then in charge of the case, organized the evidence and prepared a report, which was a time consuming procedure because of the obvious complexity of the case involving a review of 15,000 checks and much legal research. The report was delayed for a short period of time due to Mr. Suckle's illness. On July 24, 1959 the report, consisting of more than 200 pages, was turned over to the district attorney, who studied it in the time available while he was performing his numerous other duties. After an initial staff meeting on August 20, 1959, a subsequent staff meeting was held on August 25, 1959, at which time the district attorney decided that the evidence was sufficient to proceed with the prosecution of the defendants. The district attorney decided to petition to have a special grand jury to convene in order to seek additional evidence which might extend the statute of limitations or, failing that, to have the special grand jury make an interim presentment to the regular gand jury. After the Court of Quarter Sessions granted the petition for a special grand jury, a petition was filed on behalf of the defendants to secure a writ of prohibition, which was ultimately successful when the Supreme Court of Pennsylvania prohibited further action by the special grand jury: *Special Grand Jury Case,* 397 Pa. 254 (1959), 154 A. 2d 592.

When the petition for a writ of prohibition threatened to obstruct the proceedings of the special grand jury, the district attorney was faced with the necessity of an alternative procedure with time rapidly running out. Concerned that a preliminary hearing would take at least ten days, the district attorney ordered the preparation of a petition for a district attorney's bill of indictment on September 10, 1959, which petition was completed on September 15, 1959. On September 16, 1959 the petition was presented to Judge CARROLL, who approved it, and on September 17 and 18 evi-

dence was heard by the grand jury with the bill of indictment being returned on September 18, 1959.

Among the findings of fact in the opinion of Judge GOLD when this question was considered, are: "Despite the protestations of relators to the contrary, we find no evidence of undue delay or negligence on the part of the District Attorney covering the period ending July 24, 1959. . . . first, we perceive no evidence pointing resolutely to the conclusion that relators were deliberately or purposefully deprived of their right to a preliminary hearing; second, a genuine emergency existed which called for the special remedy of a district attorney's bill; and third, the public good and interest made such a step justifiable. . . . no harm has been done to the relators by the District Attorney's alleged improper conduct." The court below, in its opinion, further stated: "Local 107 is a gigantic union with more than 12,000 members situate in the greater Philadelphia area. Its immense economic influence in the transportation and allied industries is well known. We have been and are now of the belief that Local 107 is a strong, powerful, self-disciplined and militant labor organization, which, concentrated in the field of transportation, is affected with a public interest no less than the utilities, railroads and trucking industry which it serves." The court below noted that the principal reason for a preliminary hearing was to prevent a defendant from being detained for a crime he never committed. See the exhaustive opinion of Judge WOODSIDE for this Court in *Com. v. O'Brien*, 181 Pa. Superior Ct. 382, 387, 124 A. 2d 666. The court below also pointed out that the defendants were not deprived of their liberty since bail was posted an hour or so after they surrendered themselves. It also stated: "There is not a word in their [defendants'] voluminous briefs citing any harm, prejudice, or any adverse strategic position caused to them by the failure of the District Attorney to grant them a preliminary hearing. Nor was there any testimony or evidence to this effect."

The value of a preliminary hearing in acquainting a defendant with the nature of the charge and the evidence to be presented against him is uniquely absent in this case because the great bulk of the evidence, checks and vouchers, was prepared and controlled by the defendants themselves. The district attorney was confronted with an emergency. The statute of limitations was about to expire. A matter of great public importance was involved. While the crime of conspiracy is only a misdemeanor when it is applied to a situation such as was presented in this case, it is affected with a great public interest. To prevent the treasury of an important union, with its 12,000 members, from being looted was a matter of great public interest. Unions today have assumed a very important position in the economic life of our country. Millions of working people are directly affected by the conduct of such unions. It is just as important to see that the affairs of a union are conducted in an honest manner as it is to see that the affairs of a municipality are so conducted. This case, in our opinion, falls within one or more of the well recognized exceptions set forth by Judge CLARK in a charge to a grand jury in 1845, which has frequently been referred to by the courts. The exceptions are as follows: "The first of these is, 'where criminal courts, of their own motion, call the attention of grand juries to, and direct the investigation of, matters of general public import, which, from their nature and operation in the entire community, justify such intervention.' This power of the court, it is said, will only be thus exercised, however, in the investigation of general and public evils, such as great riots, general public nuisances, and flagrant vices; it will not be applied in cases of ordinary crime.

The second exception is, 'where the attorney-general, ex-officio, prefers an indictment before a grand jury, without a previous binding over or commitment of the accused.' This power is properly exercised where there is occasion for great haste in applying the machinery of the law, or

where the exigencies of the case and the public interests may reasonably require such action to be taken. The procedure in such cases, however, is under the supervision of the court, and if the process and power is misapplied the court will vindicate itself in restraining its exercise." *Com. v. Green*, 126 Pa. 531, 537, 17 A. 878.

The appellants argue that the delay was caused by the district attorney's own inactivity. We do not believe that the record substantiates this argument. Even if we did agree, we are convinced that the district attorney acted in good faith with no resultant harm to the appellants and that his action was in the public interest. The record reveals that the appellants also were responsible for much of the delay which prevented the institution of these criminal proceedings. While the facts show that the district attorney acted properly in this case, if it were otherwise certainly the rights of the people should not be deemed waived for his dereliction by having these important convictions invalidated on such a technicality.

THE ACQUISITION OF CONTROL OF THE UNION.

No brief was filed on behalf of appellant, John J. Elco. The other five appellants argued that the evidence was not sufficient to sustain a conviction. In this connection we review the evidence and inferences reasonably deducible therefrom in the light most favorable to the Commonwealth: *Com. v. Burns*, 409 Pa. 619, 187 A. 2d 552. It is our duty to accept as true all of the Commonwealth's evidence upon which, if believed, the jury could have properly based its verdict: *Com. v. Gooslin*, 410 Pa. 285, 287, 189 A. 2d 157. So considered, the evidence establishes that the defendants entered into a continuing conspiracy to cheat and defraud Local 107; that in the execution of their scheme they planned to and did gain control of the union and its treasury; that they extended their domination by replacing key officials and then proceeded to loot the union treasury by various devices.

The rules for evaluating the evidence in a conspiracy trial are well set forth by President Judge RHODES in the case of *Com. v. Evans*, 190 Pa. Superior Ct. 179, 202, 154 A. 2d 57, as follows: "In a conspiracy trial, where fraud is involved, there is a wide latitude allowed in the introduction of evidence. Consideration should be given to the background of the arrangements made by defendants and their methods of association; where a criminal scheme has numerous actors and shifting scenes of action the conspiracy is often made out by the association of detached facts and by the reasonable inferences deducible therefrom. Evidence of the acts and circumstances in fulfillment of the object of the conspiracy is relevant."

In the case of *Com. v. Burdell*, 380 Pa. 43, 49, 110 A. 2d 193, Chief Justice HORACE STERN said: "It is hornbook law that a consperator is criminally responsible for the acts of his co-conspirators which are committed in furtherance of the common design even though he was not present when the acts were committed: . . ."

Chief Justice GIBSON, in *Rogers v. Hall*, 4 Watts 359, 361, stated: "Now the least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all. . . ."

With these principles in mind, let us now consider the evidence. It shows that in November 1953 a general election was held by the union with Joseph Grace, president, presiding. He refused to recognize any nominations other than that of Cohen. The November election was set aside by the International Brotherhood of Teamsters but in a subsequent election held in May 1954, Cohen was elected secretary-treasurer and assumed office on June 4, 1954. Shortly after Cohen was elected to office, Joseph Hartsough was employed as a bookkeeper and Ben Lapensohn was hired to do assorted jobs in late June or early July of 1954. The other defendants, Walker, Berman and Elco, also supported Cohen and were recipients of union moneys which were used to pay off Cohen's election supporters.

On June 10, 1954, Cohen and Grace signed a check for $15,000.00 payable to the order of "Cash," which was endorsed by Hartsough. Five days later a second check in the amount of $10,000.00, also payable to the order of "Cash" and endorsed by Hartsough, was used, together with the first check, to pay off Cohen's election supporters. These funds were distributed by Cohen, Berman and Walker. The defendants Berman, Walker and Elco each received part of the $25,000.00. Walker got $180.00; Elco received $225.00 and Berman was paid $600.00.

The funds of the union were also used to pay $8,500.00 to one Samuel Kirsch as a repayment of election expenses. Samuel Kirsch was an employe of a closely held corporation which Lapensohn controlled.

A check of the union in the amount of $4,573.43 was used to repay Local 169 of the Teamsters Union for advances and election expenses paid by Local 169 for Cohen. Local 169 advanced Cohen $3,000.00 consisting of a check for $2,000.00 and two checks for $500.00 each. Cohen arranged for these loans with the president of Local 169, who was Edward Hartsough, brother of the defendant, Joseph E. Hartsough. In addition, Local 169 paid to Majestic Press and Keystone Printing Company the sum of $1,573.43 for Cohen's campaign literature. After Cohen gained control of the union's treasury, the above mentioned check of $4,573.43 was used by Local 107 to repay Local 169. The check of Local 107 for $4,573.43 covered the advance to Cohen in the amount of $3,000.00 and the amount paid to the printing company for the campaign literature of $1,573.43. The use of the union's money to pay for Cohen's election expenses was illegal. The officers of a union occupy a fiduciary relationship and may not use union moneys for their own private purposes. Union moneys may only be used for legitimate expenses of the union.

After Cohen became secretary-treasurer of the union, he and the other defendants proceeded to centralize their

control by violence and the threat of violence and the use of the union's money to pay off and oust all opponents. Business agent Kelleher resigned in order to "get rid of the harassment that my wife and family was going through." Business agent John Fisher's resignation was accomplished by paying him $5,000.00 out of the union treasury, which, after deductions, led Cohen and Grace to write him a check for $4,112.50. Both violence and union money were used to persuade business agent and corresponding secretary Raymond Kelly to be dismissed. Kelly testified that he "didn't want any physical violence to happen to" him.

Figures were altered on many of the checks. Harry Graff received $100.00 but the second figure was altered by an additional loop to $180.00. Patrick Flanagan received $100.00 and by the insertion of a proper mark the $100.00 was changed to $400.00. Sam Doman, Sr. was supposed to have received $225.00 but he received at most $175.00. Frank Charlton and Thomas Charlton each signed his name on the voucher with no sum of money written in. They received $100.00 each but $150.00 was written beside their names on the voucher.

THE HORN & HARDART ORGANIZATIONAL OPERATION.

Local 107 attempted to unionize Horn & Hardart and approximately 60 checks amounting to $92,385.10 were written on the union treasury. Each check was purportedly supported by a voucher explaining the expenditures. Twelve witnesses testified that they received substantially less than the amounts specified on the vouchers. All of these checks were made payable to "Cash," signed by Cohen and Grace and endorsed by Joseph Hartsough. A bank officer testified that it was their custom to require the person receiving the cash on a check drawn to the order of "Cash," to endorse the check. Elco was in charge of this operation. He rented the office headquarters, ordered the telephone service in his name and signed vouchers for

a number of men and on a number of occasions the recipient did not get as much money as he had signed for.

The Gallagher Strike.

In January and February of 1957 the union struck E. A. Gallagher Company. Eight checks totaling $41,710.00 were written to the order of "Cash," signed by Cohen and Grace and all but one were endorsed by Hartsough. Some 13 witnesses testified that they received less money than was stated on the vouchers signed by them in blank.

Missing and Unexplained Checks to Ben Lapensohn.

In addition to Lapensohn's regular pay checks, a series of 13 checks were written to his order without any voucher in the union records to explain their issuance. Stubs contained the notations, "Services Rendered," "Personal Services," "Returned Expenses" and "Extra Expenses." These checks were all for sums in excess of $800.00. Ten of these checks were missing. An examination of the union check book showed that the cancelled checks had been scotch taped in and then ripped out of the check books.

Clothing Purchases.

Checks were written on the union bank account covering various clothing purchases at Diamond & Company for Cohen and Walker. A series of purchases for Cohen totaled $1,333.99, ranging from suits in the amount of $135.00 to ties up to $10.00. Union checks for a total of $1,200.00 were issued in payment of Cohen's personal bills of $1,196.00. Among the items of clothing billed to Cohen's account and paid for by a union check, were a suit and topcoat for Walker totaling $220.00.

In addition, a Local 107 check for $500.00 was issued to pay for clothing purchased at Diamond & Company by

Walker, including an overcoat, suits, topcoat, two pairs of shoes, ties, shirts and a collar pin.

TRAILER DROPS.

In December 1954 Food Fair was permitted to use trailer drops, which gave them a competitive advantage over Acme and A & P and other chain stores. A trailer drop means that the trailer has been detached from the truck and left at a store. The trailer can then be unloaded at the convenience of the store personnel. It also affords additional storage space for the store. In 1954 Cohen announced that Local 107 would not permit trailer drops. A deal was made with Food Fair officials as a result of which they were allowed to have 283 trailer drops. Lapensohn had asked Louis Stein, president of Food Fair, for some of Stein's stock options on Dan River Mills, Inc. Stein ultimately arranged for Lapensohn to buy 500 shares of Dan River Mills stock at $20.00 a share when the actual value was $29.00 to $31.00. In August and September 1955 Stein arranged for a nominee of Lapensohn and Cohen to purchase Food Fair Properties, Inc. stock substantially below the market value. The names of Cohen and Lapensohn appeared on the list each to receive 1,000 shares for $1.00 a share and then each name was stricken off and the name of Lapensohn's brother-in-law, Jack Shore, was listed to receive the 2,000 shares. Lapensohn wrote a check for $2,000.00 to Shore, who deposited that check to his account and then Shore issued his check for $2,000.00 to Eastman-Dillon to pay for the stock. At the time he bought the stock for $2,000.00, it was worth $7,000.00. Stein further arranged for Shore, as Lapensohn's nominee, to buy 200 units of Food Fair Properties, Inc. substantially below market value. Lapensohn issued his check for $10,000.00 to Shore on October 3, 1955 in order to enable Shore to issue his check for $10,000.00 to Mandell to pay for the units necessary to acquire the stock. At the time these units were transferred to Shore for $10,000.00, their market

value was approximately $14,000.00. Lapensohn and Cohen receiver these stocks far below their market value but by so doing they cut down the number of employes which their union would have furnished to Food Fair, thus hurting the union and its members.

The Kanner Checks.

Seven checks were written on the union bank account payable to the order of one Dave Kanner for a total of about $8,000.00. Kanner was identified as one of the union's attorneys. He did not endorse or cash these checks and he did not authorize any one to sign his name on his behalf. One check payable to the order of Kanner for $1,750.00 was cashed via a forged endorsement at the same bank, on the same date and by the same teller who cashed a $1,750.00 check for Lapensohn, which was deposited to Lapensohn's account. Another forged check for $2,500.00 was dated April 11, 1956. The evidence showed that the check for $2,500.00, payable to Kanner, was given to Lapensohn for transmittal in April of 1956.

The Katz Check.

On January 13, 1956 a Local 107 check for $1,000.00 was issued to the order of one Joseph E. Katz, an attorney who had performed legal services for Lapensohn personally during 1956 but who was never employed by the union. The check was not endorsed by Katz. It was cashed on January 13, 1956 at the Broad Street Trust Company by Teller 41 and on that same date, at the same bank, the same teller cashed a check for $1,000.00, as shown on a deposit slip credited to Lapensohn.

The Mastrin Check.

Philip Mastrin was an architect employed by Local 107 to perform architectural services on a building to be constructed in Wilmington, Delaware. A portion of his bills

included an invoice for $1,500.00 dated June 6, 1956, and an invoice for $1,000.00 dated April 26, 1956. This April 26 invoice was marked "Void" by Mastrin at or about that date. A check dated June 7, 1956 was issued by Local 107 to his order for $2,500.00, signed by Cohen and Grace. Lapensohn took that check to Mastrin, who endorsed it, and then Lapensohn cashed it. Of the $2,500.00, Lapensohn gave Mastrin $1,500.00 in cash and took $1,000.00 in cash for himself.

The M. M. Marshall & Company Checks.

Morris Marshall & Company is a construction firm with which Local 107 contracted to erect the Wilmington office building. A number of checks were issued by Local 107 to M. M. Marshall & Company. From the records of M. M. Marshall & Company the Commonwealth proved that three checks, issued by Local 107 to M. M. Marshall & Company, were not received and recorded on the books of the company in the normal course of business. These three checks were for $4,800.00, $3,125.00 and $955.00. After an investigation started in this matter, efforts were made to account for the check for $4,800.00. James Cadigan, the F. B. I. expert on questioned documents, testified that high-powered microscopic analysis showed that an entry on the Marshall books for $10,080.00 had been erased and raised to $14,800.00, and that the endorsement "M. Marshall" was a forgery. The checks for $3,125.00 and $955.00, which were never entered on the books of M. M. Marshall & Company, were cashed on the same day, at the same bank, by the same teller who cashed one of the Kanner checks and who handled other business for Lapensohn.

The Grace Checks.

Some 23 checks were issued to the order of Joseph Grace, in addition to his regular weekly pay checks, purportedly for travel expenses for trips to Chicago, San Francisco, Washington, New York and numerous other

places. Grace was president of the union but died prior to the trial of this case. The indictment against him therefore abated. Dr. Joseph Turci, Grace's personal physician, testified to the effect that his health precluded such travel and Mrs. Grace testified that her husband never made such trips. These 23 checks were not endorsed by Joseph Grace and most of them were cashed at the Broad Street Trust Company by the same teller and on the same date that Cohen, Walker and Hartsough cashed other checks. While these fabricated and forged expense checks were being cashed at the Broad Street Trust Company, Grace conducted all of his personal banking at the Huntingdon Valley Bank and Trust Company, where he also cashed his paychecks.

Improper Insurance Payments.

Local 107 issued numerous checks payable to the order of Jerome S. Friedman, an insurance broker, which covered personal insurance policies for Cohen, Mrs. Cohen, Grace and Walker. The detail of these checks need not be given. Suffice it to say that these and other checks of the union paid for numerous yacht and home owner policies for Cohen personally and for automobile insurance for Mrs. Cohen's Cadillac convertible for the years 1955 and 1956.

Miscellaneous Improper Payments to Cohen.

On July 16, 1954 a Local 107 check was issued to Cohen for $5,673.80, purportedly for his expenses from January 1954 and running through June 1954. These checks were for reimbursement of expenses allegedly incurred by him prior to the time that he was secretary-treasurer of the union. On July 12, 1954 a union check was issued, payable to "Cash," for $1,000.00, which was endorsed by Hartsough. The voucher purported to cover expenses incurred by Cohen in February 1954. After

Cohen took control of the union, he paid himself $7,560.00 in retroactive salary covering the period from January 1, 1954 through June 1954, when he actually became secretary-treasurer. On December 20, 1954 the union issued a check to Mr. and Mrs. Peter Paul for $1,900.00, which covered rental of a house in Florida by Cohen for five months between January and May of 1955.

THE LAPENSOHN-COHEN CASH INTERCHANGE.

Lapensohn was the recipient of a large part of the funds siphoned from the Local 107 treasury through the various devices discussed above. A portion of these moneys was traced from Lapensohn to Cohen through three transactions:

1. In late March 1955, Cohen arranged to buy a boat for $18,000.00 from Earl M. Reed through Glen E. Keagle, who acted as the broker. Seventeen thousand dollars of the purchase price was paid by having Lapensohn issue his check to the order of "Cash" for $17,000.00 to purchase a treasurer's check from the Broad Street Trust Company payable to the order of Earl M. Reed. Cohen turned this check over to Glen Keagle, the broker, who then turned the check over to Reed, the seller of the boat.

2. Lapensohn issued his personal check to Raymond Cohen, dated June 20, 1956, for $2,500.00.

3. Lapensohn issued his personal check, payable to the order of "Cash" for $2,000.00 on September 14, 1956 with a notation in the lower left-hand corner "Joe Hartsough" "Ray."

SUMMARY OF FINANCIAL TRANSACTIONS OF COHEN.

A summary of Cohen's financial transactions from January 1, 1956 through June 30, 1957 showed that Cohen had known total expenses of $118,133.48 and available

funds to spend of $78,317.72, with a consequent disparity of $39,815.76.

INTERNATIONAL CONVENTION EXPENSES.

On September 16, 1957 checks were written, inter alia, to Cohen, Walker, Elco and Berman for alleged convention expenses. The Walker and Elco checks were endorsed by Hartsough. The Commonwealth contended and proved that these sizable funds (Cohen, $3,000.00; Walker, $2,000.00; Berman, $2,000.00, and Elco, $1,570.00) were grossly excessive; that the expenses and legitimate costs at the International Convention were much lower than the amounts taken.

It will not be necessary to detail each of these costs as one will be typical of the others. Walker's hotel bill amounted to $285.19, his round trip first class plane fare to Miami, Florida, was $155.87. He was in Florida from September 22, 1957 through October 7, 1957. Allowing the most generous estimate for food and incidental expenses, the jury could properly and reasonably infer that his expenses could not legitimately have totaled $2,000.00. The jury could well conclude from this evidence that Cohen, Walker, Berman and Elco received checks from the union treasury covering far more than their legitimate expenses to this convention. Hartsough endorsed and cashed the checks of Walker and Elco and therefore all of the six co-conspirators were involved, except Lapensohn, who had left the union in November 1956.

After a thorough consideration of the evidence in this case we are convinced that it was sufficient to sustain the convictions of each appellant.

SINGLE CONSPIRACY OR MULTIPLE CONSPIRACY.

The appellants argue that the evidence does not sustain a conviction of a single conspiracy but rather that it tends to prove multiple conspiracies. They argue that the inci-

dents involve different personnel, different objectives, different motives and different means and accomplishments.

The bill of indictment charged a simple overall conspiracy participated in by all appellants to cheat and defraud Local 107 and its members. The learned trial judge, DAVID L. ULLMAN, very carefully and accurately charged the jury on this point. He pointed out to the jury that the real question was "whether two or more of these defendants entered into a single, overall, comprehensive plan to cheat and defraud the union" or whether the evidence showed "multiple, separate, unrelated, distinct instances of cheating and defrauding," and expressly told them that in the event of finding the latter, they could not convict defendants because they were indicted for partaking in one overall conspiracy. The jury found the defendants guilty and we may therefore assume that they found one overall conspiracy. In our judgment, the evidence was sufficient to justify this finding.

It was pointed out in *Com. v. Evans*, supra, at page 202, that "where a criminal scheme has numerous actors and shifting scenes of action the conspiracy is often made out by the association of detached facts and by the reasonable inferences deductible therefrom.". The *Evans* case involved a single conspiracy indictment charging that the defendants contrived to defraud the Pennsylvania Turnpike Commission of millions of dollars.

In *Com. v. Fulton*, 56 Pa. Superior Ct. 86, 87, 88, the Court said: "We think it sufficient to say, that after a careful reading of it, we are convinced it tended to establish every ingredient of the offense charged. It showed a long and complicated series of acts, extending over a period of years; the creation of a number of corporations, each and every one of which, however, constantly remained under the control of the same persons; a line of transactions by which the assets, real or apparent, of one corporation were shifted to the treasury of the next until all of them disappeared from the view of the stockholders who had fur-

nished the real money embraced in the transactions. It exhibited the various steps that had been taken to bring about the final result; that it constantly required the action and co-operation of two or more people to do the things that were done, and it almost irresistibly led to the conclusion that this harmony of action was neither accidental nor born of ignorance of the consequences that would follow. The results that did follow seem to us, as they seemed to the jury, to have been what would naturally be expected, and the appellant has not much ground to complain that the explanation he attempted to offer of these various transactions was not accepted by the jury."

In *Com. v. Spillman, Kays & Coggins*, 74 Pa. Superior Ct. 192, 198, Judge (later President Judge) KELLER said: "Nor was it necessary that the unity of purpose or design requisite to secure a conviction of conspiracy should be manifested by an equal sharing of the spoils among the conspirators or a use of the funds thus obtained in the same enterprise. If the actions of the conspirators showed a common design that one of their number should specially profit as a result of their illegal operations, there was present sufficient unity of purpose or design to secure a conviction. Nor was it essential that it should have been the purpose of the conspirators to wreck the trust company when they embarked on their common enterprise; it was sufficient if there was present a common design to divert the funds of the trust company improperly to their benefit or the benefit of any of them, or to secure profits to themselves or any of them by devious and unlawful methods to the injury of the trust company: . . ."

In *Com. v. Strantz*, 328 Pa. 33, 43, 195 A. 2d 75, it is said: "An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. In Com. v. Jermyn, 101 Pa. Super. Ct. 455, 465, the Superior Court, speaking through Judge GAWTHROP, aptly said: 'The joint

assent of minds required to sustain a charge of conspiracy may be inferred from facts which establish . . . that the conspiracy had been formed.' "

In *United States v. Gilboy*, 160 F. Supp. 412, 454, it is stated: "Neither a multiplicity of objects nor of means convert a single conspiracy into more than one offense. 'The conspiracy is the crime, and that is one however diverse its objects.' . . . A single agreement to commit an offense does not become several conspiracies because it continues over a period of time." At page 455 (quoting from *United States v. Patten*, 226 U. S. 525 ,544, 57 L. Ed. 333, 33 S. Ct. 141, 145): ". . . the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

In *United States v. Rosenberg*, 195 F. 2d 583, 600, 601, the Court said: "What distinguishes a single conspiracy from several related ones is a single unified purpose, a 'common end'. . . . The 'common end' consisted of the transmission to the Soviet Union of any and all information relative to the national defense. . . . Sobell is confusing the particular part each conspirator played in the espionage activities with end-all purpose of all the conspirators—the aiding of Russia by sending to it any and all kinds of secret information. It did not matter that Sobell knew nothing of the atomic episodes; he is nevertheless charged with the acts done by Greenglass, Gold and Rosenberg, in furtherance of the over-all conspiracy. The jury could and did reasonably find that Sobell consented to the dominant aim, and so became a member of the Rosenberg-Greenglass-Gold conspiracy."

We are convinced that the evidence in this case reveals a single overall conspiracy of a continuing character in which each of the defendants was an active participant. The aim of this conspiracy was to cheat and defraud Local 107 through devious and unlawful means and devices. The fact that the conspirators, either individually or in groups,

performed different tasks or used different means, or received disproportionate shares of the loot, is of no significance.

STATUTE OF LIMITATIONS.

It will be recalled that on September 18, 1959 the grand jury returned a bill of indictment charging the defendants-appellants (including Joseph E. Grace, then Local 107's president, now deceased) with conspiracy to cheat and defraud Local 107 from "on or about June 10, 1954 and thereafter on divers dates continuing to and including September 19, 1957." A check payable to the order of Joseph E. Grace was drawn on the account of Local 107 and dated September 16, 1957. From the face of that check the jury could well infer that it was cashed by someone on September 19, 1957. On that date money was undoubtedly extracted from the union's funds. The check was for the sum of $2,500.00. Making the most generous allowances for extra expenses and plane fare, Grace could not reasonably have spent $2,500.00 for legitimate convention expenses. The jury could reasonably infer that the excess was pocketed by him. The jury also could find from this evidence that the conspiracy continued until at least that date. The Negotiable Instruments Law in Pennsylvania is emphatic that the crucial date on a check transaction is the date it is presented and collected.

The Uniform Commercial Code provides in § 3-409(1), 12A PS § 3-409(1): "A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." That provision of the Uniform Commercial Code is in line with § 189 of the old Negotiable Instruments Act of 1901.

In *School District of the Township of Robinson v. Cook*, 91 Pa. Superior Ct. 207, 212, it is stated: "Sec. 189 of the Negotiable Instruments Act of 1901, P. L. 219, provides: 'A check, of itself, does not operate as an assignment

of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.' "

In *Merchants Bank v. State Bank*, 77 U. S. 1008, 1019 (10 Wallace's Reports 604, 647), it was stated, in speaking of a check: "It is not due until payment is demanded, and the Statute of Limitations runs only from that time." This general rule has been expressed in 34 Am. Jur., Limitation of Actions, § 154, page 122, as follows: ". . . the correct rule seems to be that the statute begins to run in favor of the drawer not later than the time when the check should have been presented for payment at the bank upon which it is drawn; and since a check must be presented for payment within a reasonable time, it seems that the statute of limitations begins to run at the expiration of a reasonable time after the delivery of the instrument."

The statute of limitations does not run from the time of delivery of the check (September 16, 1957) but would begin to run at the time the check is presented for cashing (September 19, 1957); or if not presented promptly, within a reasonable time after the delivery of the check, which ever occurs first. The Grace check was presented within a reasonable time and the date of cashing, September 19, 1957, is controlling. Thus an overt act within the statutory period was proved.

In *Com. v. Dunie*, 172 Pa. Superior Ct. 444, 447, 94 A. 2d 166, we said: "A conspiracy renewed by repetitions may be prosecuted, and indictment found, at any time within two years after the commission of the last offense, by charging the crime within the statutory period."

In *Com. v. Kirk*, 141 Pa. Superior Ct. 123, 136, 14 A. 2d 914, affirmed 340 Pa. 346, 17 A. 2d 195, we said: " 'The fact that a conspiracy existed on the [31st day of December, 1937] or upon any other day within two years of the exhibiting of the bill of indictment, may be shown by the previous acts, conduct or declarations of the parties. The Statute of Limitations affects the crime, not the proof of

it . . . where in conspiracy an overt act is done within two years, and said act is but one of a series of acts committed by the parties, evidently in pursuance of a common design and to carry out a common purpose, such acts would be in evidence, provided they tend to show that the last act was a part of the series and the result of an unlawful combination; and such evidence may satisfy a jury of the existence of a conspiracy at the later period': Com. v. Bartilson, 85 Pa. 482, 489." See also *Com. v. Routley*, 115 Pa. Superior Ct. 125, 131, 174 A. 657, where we said: "Conspirators, by escaping prosecution for two years, do not secure immunity for their continued unlawful acts, done in furtherance of, or pursuance to, the conspiracy, after the two years have expired. A completed conspiracy must be prosecuted within two years after it *ceased;* but a conspiracy renewed by repetitions may be prosecuted, and indictment found, at any time within two years after the commission of the last offense, by charging the crime within the statutory period. While this conspiracy may have started in 1928, the evidence supported a finding that it was renewed, and the illegal gains participated in by the defendants, up to December, 1931. Hence the prosecution was not barred when the indictment charging the offense as of September, 1930, was returned a true bill at the June 1932, Session."

The cases of *Com. v. Fabrizio*, 197 Pa. Superior Ct. 45, 176 A. 2d 142, and *Com. v. Bartilson*, 85 Pa. 482, are not applicable to the facts of this case. In *Fabrizio* there was no overt act in furtherance of the conspiracy after the initial date. Judge WATKINS, who wrote the opinion in *Fabrizio*, was aware of the distinction between the facts in that case and in a case where there was a continuous conspiracy with repetitious overt acts. In *Bartilson* the date of the conspiracy within the two-year period was not set forth in the indictment.

At the oral argument counsel for appellant Walker argued that the evidence did not conclusively show that

Grace cashed a check on September 19, 1957. We believe that the evidence was sufficient to permit the jury to draw this inference. Accepting for the sake of argument Walker's theoretical hypothesis that Grace did not cash a check on September 19, 1957, the evidence is indisputable that someone did cash it on that date. Even though some unknown person might have cashed the check on that date, the law is clear that there may be a co-conspirator who is unknown and unnamed in the bill of indictment. The indictment in this case did, in fact, charge the defendants with conspiracy "together with divers other persons whose names are yet unknown." In *Com. v. Bonnem*, 95 Pa. Superior Ct. 496, 501, we held that a defendant could be convicted of conspiracy "where one alone is indicted for conspiracy with others unknown." To the same effect see *Com. v. Hoffman*, 103 Pa. Superior Ct. 433, 157 A. 221; *Com. v. Salerno*, 179 Pa. Superior Ct. 13, 116 A. 2d 87. If some person other than Grace cashed the check, then the jury could well find that act was in furtherance of the conspiracy by the unknown, unnamed conspirator.

It has also been argued that an overt act occurred when the officers of the union signed the check for $2,500.00 and delivered it to Joseph E. Grace, the payee, on September 16, 1957. But certainly another overt act occurred when Grace or some unknown conspirator presented the check to the bank on September 19, 1957 for payment. There is no reason why there cannot be two overt acts in connection with the Grace check. An overt act is an act which is done openly by one of the co-conspirators to accomplish the purpose of the conspiracy to defraud the union. The check bore the endorsement of Joseph E. Grace and the jury could infer that he received the payment of the check on September 19, 1957. That was the date upon which the money was extracted from the union. The Commonwealth having won the verdict, the inference must be drawn most strongly in its favor.

The prosecution against appellant Lapensohn was not barred by the statute of limitations even though he ceased

to be connected with the union in November 1956. The jury could have found that Lapensohn committed acts in furtherance of the conspiracy as late as September 14, 1956 when he turned over $2,500.00 to Cohen, and perhaps as late as October 2, 1956 when the forged Kanner and Marshall checks were uttered and even as late as November 1956 when his employment with Local 107 terminated.

It was stipulated by all counsel and parties that Mr. Benjamin Lapensohn was out of the Commonwealth of Pennsylvania, the relevant jurisdiction, from May 10, 1957 until July 1, 1958.

The tolling of the statute of limitations was specifically pleaded in the bill of indictment, as follows: "And the Grand Jury further presents that the said BEN LAPENSOHN from May 9, 1957 and continuously thereafter until July 3, 1958 was not an usual resident or inhabitant of this Commonwealth." The Act of March 31, 1860, P. L. 427, § 77, as amended April 6, 1939, P. L. 17, § 1, 19 PS § 211, provides as follows: "Provided however, that if the person against whom such indictment shall be brought or exhibited, shall not have been an inhabitant of this State, or usual resident therein, during the said respective terms for which he shall be subject and liable to prosecution as aforesaid, then such indictment shall or may be brought or exhibited against such person at any period within a similar space of time during which he shall be an inhabitant of, or usually resident within this State."

By simple calculation, after taking out the period of thirteen months and twenty days when Lapensohn was not an inhabitant or resident, it is clear that Lapensohn was properly prosecuted in this case. The timeliness of the indictment would be calculated by subtracting from September 19, 1959 (the date when the true bill was found) the period of two years (the normal statute of limitations) plus thirteen months and twenty days (the period of tolling while Lapensohn was outside of Pennsylvania). Thus, by subtracting three years, one month and twenty days from

September 19, 1959, the indictment would have been timely providing Lapensohn's participation in the conspiracy were proved through or after August of 1956. The evidence is clear that it was so proved.

The law on this subject is clearly set forth in *Com. v. Wilcox*, 56 Pa. Superior Ct. 244, 252, 263, as follows: "So here we hold that the proviso to sec. 77 was not intended to discriminate and does not between citizens of a foreign state and citizens of Pennsylvania. It says to either and to both alike, if you have committed a misdemeanor within the portals of the state, you shall not be prosecuted after a period of two years, provided during that period you are an inhabitant or usual resident of the state. But it declares in the same voice, to both, that neither of you shall have the protection afforded by the statute if, during that period, you are not an inhabitant or usual resident of the commonwealth."

The case of *Com. v. Turner*, 176 Pa. Superior Ct. 32, 107 A. 2d 136, is not applicable to the facts of this case because in that case the defendant throughout the entire period appeared regularly at his place of employment every weekday, where he was available for arrest.

We are therefore of the opinion that the statute of limitations did not prevent the prosecution against Lapensohn or any of the other appellants.

Lack of Authorization.

A number of the appellants argue that the Commonwealth failed to prove that the withdrawal of funds from the union treasury was unauthorized and for purposes which were not for the benefit of the union. We believe that a fair reading of the record will reveal that the rank and file of the union could not have successfully opposed the actions of the appellants. Appellants met prior to the meetings of the members to determine just what motions should be presented and then after the meetings they arranged the minutes to suit their purpose. The

trial judge characterized this defense as "brazen." It must be remembered that the assets of the union were trust funds and that they could not legally be used for appellants' personal matters, even if authorized by the majority of the union members.

The Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. A., § 401 et seq., provides that labor union officials abide by the ordinary rules of fiduciary relationship. Section 501(a) states: "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organizations and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and . . . to refrain from . . . holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization. . . ."

The same section provides further: "A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

That the appellants could not justify using union funds for their own purposes even if they were authorized, was clearly demonstrated in the case of *Highway Truck Drivers and Helpers Local 107 v. Cohen*, 182 F. Supp. 608, affirmed 284 F. 2d 162, cert. denied 365 U. S. 333, 81 S. Ct. 747, 5 L. Ed. 2d 744. In that case the appellants sought to pay their lawyers out of union funds for representing them in these criminal proceedings, based on a resolution adopted by the general membership of Local 107. The Court of Appeals held that the resolution was "invalid because it authorized action beyond the powers of the union as derived from its constitution and was inconsistent with the aims and purposes of the Labor-Management Reporting and Disclosure Act." 284 F. 2d 162, 164.

In a follow-up opinion, filed by Judge Body on April 5, 1963, in *Highway Truck Drivers and Helpers v. Cohen*, Civil Action No. 27053, in the United States District Court for the Eastern District of Pennsylvania, it was decided that Cohen and Walker, among others, must repay to Local 107 all moneys expended on behalf of legal fees for defendants, notwithstanding the prior authorization by Local 107's membership. While this principle may be new to federal law, it has been the law in Pennsylvania and elsewhere for many years. See *Leatherman v. Wolf*, 240 Pa. 557, 88 A. 17.

In 87 C.J.S., Trade Unions, § 26, page 791, the rule is stated as follows: "A union's powers must be exercised by its officials in good faith and for valid purposes. Although the legal title to property accumulated by the union from its members is vested in officers, such ownership is of a trust character for the use of individual members."

It must be remembered that, while not on trial for the substantive crime of larceny or stealing of the union's funds, the record really reveals that the appellants could have been convicted of such crimes had criminal action been instituted within the period allowed by the statute of limitations. There can be no valid authorization for criminal conduct: *Com. v. Hansell*, 185 Pa. Superior Ct. 443, 137 A. 2d 816; *Com. v. Kolb*, 13 Pa. Superior Ct. 347. There was no burden upon the Commonwealth to prove lack of authorization: *Com. v. Wiswesser*, 124 Pa. Superior Ct. 251, 188 A. 604.

The Commonwealth did not attempt to shift the burden of proof to the defendants. The distinction between shifting the burden and the time when the Commonwealth has met its burden by introducing the requisite evidence to constitute a prima facie case is set forth in *Com. v. Bolger*, 182 Pa. Superior Ct. 309, 313, 126 A. 2d 536, as follows: "We are convinced that the evidence of the Commonwealth made out a prima facie case sufficient to compel the defendant to come forward with a defense. Counsel for the appellee cited Com. v. Kolsky, 100 Pa. Superior Ct. 596, for

the principle of law that to justify a conviction, where the Commonwealth's evidence tending to connect the defendant with the crime is wholly circumstantial, the evidence of facts and circumstances must be such as to exclude to a moral certainty every hypothesis but that of guilt of the offense imputed. This is no longer the law in Pennsylvania. The requirement of the law is stated in Com. v. Bausewine, 354 Pa. 35, 41, 46 A. 2d 491, as follows: 'The reasonable inference of guilt must be based on facts and conditions proved; it cannot rest solely on suspicion or surmise. These do not take the place of testimony. The facts and circumstances proved must, in order to warrant a conviction, be such as to establish the guilt of the defendant, not necessarily beyond a moral certainty, nor as being absolutely incompatible with his innocence, but at least beyond a reasonable doubt.'"

PEREMPTORY CHALLENGES.

The trial court permitted the defendants, jointly, six peremptory challenges and the same number to the Commonwealth. The appellants argue that they were each entitled to six peremptory challenges, a total of 36, as against only six for the Commonwealth. This subject has been ruled upon by us heretofore and we need not discuss the subject in detail. The Act of March 31, 1860, P. L. 427, § 40, 19 P. S. § 785, provides: ". . . in all cases of joint trials, the accused shall have the right to the same number of peremptory challenges to which either would be entitled if separately tried, and no more." There is no constitutional guarantee of peremptory challenges in a criminal trial: *Com. v. Deutsch*, 72 Pa. Superior Ct. 298. It was ruled in *Com. v. Antice*, 146 Pa. Superior Ct. 293, 313, 314, 22 A. 2d 204, that in a conspiracy charge the defendants were together entitled to only six peremptory challenges.

The right to peremptory challenge originated in the legislature and is subject to change or even abrogation by the legislature so long as it does not deny accused a trial

by jury "as heretofore." *Com. v. Giambrone*, 183 Pa. Superior Ct. 283, 295, 130 A. 2d 254.

SEQUESTRATION OF JURY.

It is argued by the appellants that they were denied due process and a fair trial because of the sequestration of the jury. The facts as presented to the court provided ample cause for the action of the trial judge. A nationwide television show was scheduled from ten to eleven that evening in the Brinckley Journal, which featured an exposé of the National Teamsters, including a film clip on Raymond Cohen. An advance script of that program had been obtained from the National Broadcasting System, which was reviewed by the trial judge. A transcript of the proceedings in the recent case of *United States v. Hoffa*, tried in the United States District Court in Nashville, Tennessee, disclosed flagrant efforts to tamper with that jury. Transcripts of those hearings were reviewed by the trial judge. The sequestration of the jury was necessary in order to secure to the appellants and the Commonwealth a fair trial. A large discretion is reposed in the trial judge on this question. There was ample authority for the court's action. *Com. v. Swift*, 44 Pa. Superior Ct. 546.

EVIDENCE OF OTHER OFFENSES.

Some of the appellants argue that evidence tending to show the commission of other crimes for which they were not indicted, and which, as independent crimes, could not be prosecuted by reason of the statute of limitations, was improperly admitted in evidence. As to this the trial judge made a comment in his opinion which we approve. He said: "It would seem a reductio ad absurdum to contend that a criminal conspiracy can only be established by proof of *legal* acts. If such were the law, then conspirators who implemented their criminal plans only by criminal acts would perforce have to go free for lack of proof of legal acts to accomplish their illegal purpose."

In a conspiracy trial where fraud is involved, there is a wide latitude allowed in the introduction of evidence. In 15 C. J. S., Conspiracy, § 92(b), p. 1143, it is stated: "The prosecutor has the right to show the whole history of the conspiracy from the commencement to its conclusion. It is no objection that the evidence covers a great many transactions and extends over a long period of time, that it may show another crime, that the acts, evidence to show which is offered, occurred some time before the alleged formation of the conspiracy, or after its termination, provided, however, that the facts shown have some bearing on and tendency to prove the ultimate fact at issue."

We are of the opinion that the evidence of the other crimes was relevant and material to the proof of the crime of conspiracy to defraud the union.

SEVERANCE.

We have held repeatedly that the trial court's refusal of a motion for severance will not be disturbed unless there is a palpable abuse of discretion: *Com. v. Novak*, 165 Pa. Superior Ct. 576, 69 A. 2d 186; *Com. v. Kloiber*, 378 Pa. 412, 106 A. 2d 820.

In *Com. v. Abney*, 195 Pa. Superior Ct. 317, 171 A. 2d 595, fourteen defendants were charged with participating in a riot. We said, at page 323: "All the defendants in this case were charged with conspiracy and with participating in a crime which, by definition, cannot be committed by less than three people. A joint trial is permissible, if not necessary, where the defendants are charged with participating in the same conspiracy and riot, and where much of the same evidence is applicable to all defendants."

MISCELLANEOUS.

It is argued by counsel for appellant Cohen that he was prejudiced when the court refused to permit the cross-examination of the witness Marjorie Battisfore as to her residence. An individual who had been following Mrs.

Battisfore was apprehended by a county detective and brought to the trial judge's chambers, where the individual refused to identify himself or discuss the purpose of his activity. It was ascertained that he was an investigator for a private detective agency and had been employed by defense counsel to follow Mrs. Battisfore. The safety of the witness was properly a matter of concern for the court. This was a matter which was within the discretion of the trial judge: *Com. v. Wood*, 366 Pa. 618, 79 A. 2d 408; *Com. v. Horvath*, 187 Pa. Superior Ct. 206, 214, 144 A. 2d 489; *Com. v. Coroniti*, 155 Pa. Superior Ct. 131, 137, 38 A. 2d 397.

Counsel for appellant Cohen also argues that his client was prejudiced because the court permitted the jury to view a number of cardboard charts which showed the financial transactions of Cohen. The charts were offered for auxiliary and explanatory purposes only and the court, in its charge, correctly advised the jury on this subject. The factual material set forth by the charts was proved by documents obtained from the banks where Cohen dealt and by other documentary evidence showing numerous purchases by Cohen. These charts revealed in detail receipts and expenditures during a period of time relevant to the case and in the final analysis showed that the expenditures exceeded the receipts by $39,000.00. Complaint is also made that the Commonwealth's witness, on cross-examination, admitted that the sum of $8,800.00 in expenditures was not accurate and that the information was obtained from a fire insurance policy covering articles of private property purchased during that period of time. If this item of $8,800.00 were taken out, it would still show that approximately $30,000.00 was spent over and above receipts. This evidence was properly admitted to show motivation for a crime: *Com. v. Burns*, 198 Pa. Superior Ct. 208, 182 A. 2d 232. See also *Com. v. Greenberg*, 339 Mass. 557, 160 N. E. 2d 181, where the court, at pages 581, 582, said: "The Commonwealth called as a witness an accountant who had

collated the checks and deposit slips of Greenberg and Maitland which had been admitted in evidence and had listed their dates and the amounts on large charts which were shown to the jury and later admitted in evidence. The defendants assigned as error the admission of these charts. In view of the large number of transactions involved in the trial and the multiplicity of the exhibits bearing on those transactions, the judge could properly find that concise schedules demonstrating the transactions would be helpful to the jury. It was said in Boston & Worcester R. R. Corp. v. Dana, 1 Gray 83, that 'in a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of books and documents were put in evidence,' concise statements of their content verified by persons who had prepared them from the originals were the only means for presenting to the jury an intelligible view of the issues involved. Jordan v. Osgood, 109 Mass. 457, 464; Cornell-Andrew Smelting Co. v. Boston & Providence R. R., 215 Mass. 381, 390-391."

Complaint is also made as to the court's ruling permitting the use of a prior consonant statement of a witness whose direct testimony was attacked on cross-examination as being biased and of recent fabrication. This complaint probably refers to the testimony of Harry Graff. In 1954 he was an active supporter of Cohen in his campaign for election as secretary-treasurer of the union. Following Cohen's election, Graff was paid the sum of $100.00 for services rendered and he signed a receipt for that amount. When the sheet was produced at the trial, the figure "100" had been changed to "180". Graff testified that the figure was not in the same form in which he wrote it at the time he received the $100.00. On cross-examination defense counsel brought out that Graff had testified previously concerning this matter in Washington, D. C. during a Senate investigation, and that on this occasion the witness had pleaded the fifth amendment. It was further brought out on cross-examination that the witness was at the time

of the present trial a member of Voice, a dissident group with Local 107, whose object was to oppose defendant Cohen and his group. The district attorney made an offer to use a statement signed by the witness in 1958 (prior to the time he pleaded the fifth amendment) given to an investigator for a Senatorial Committee wherein the witness (five years before the present trial and at a time when the witness was loyal to Cohen) stated the history of the transaction just as he described it in the present trial. Defense counsel, by their cross-examination of the witness, were endeavoring to show that at the trial the witness was hostile because he had changed his loyalty from Cohen to the Voice group. The prior consonant statement, therefore, was properly admitted to offset the picture as presented by defense counsel in the cross-examination of the witness. The admission of such testimony is a matter to be decided in each case by the trial judge in the exercise of a wise discretion and depends largely upon the character and degree of impeachment indulged in by the opposite party: *Lyke v. Lehigh Valley R. R. Co.*, 236 Pa. 38, 50, 84 A. 595. The prior consonant statement was relevant to rebut the inference that the witness' testimony was of recent fabrication: *Com. v. Friedman*, 193 Pa. Superior Ct. 640, 648, 165 A. 2d 678.

It is also contended that the court erred in referring to the testimony of Marjorie Battisfore in a manner which authenticated certain check books as those of Local 107. She did not authenticate any records but she did testify that she knew from her personal knowledg that the check books were kept by Joseph Hartsough and that she recognized his handwriting. As a non-expert witness she was permitted to testify as to handwriting with which she was familiar: *Hershberger v. Hershberger*, 345 Pa. 439, 444, 445, 29 A. 95. We do not believe that, under the circumstances of this case, appellants were prejudiced by the court's comment on this subject.

Counsel for appellants also complain that the court caused the witness, Robert Lazovitz, to testify and produce

certain books and records. All that the court really did was to make Lazovitz produce the records of the M. M. Marshall Co. Since these books could have been subpoenaed, we believe there was no error in this connection. The Commonwealth was precluded, under the trial judge's order, from questioning Lazovitz on a number of topics and of this only the Commonwealth could complain.

Other complaints were made as to the admission of testimony and the injection of the judge into the trial of the case and as to parts of the court's charge. To individually discuss each and every one of these matters would unduly prolong an opinion which is already too long. Suffice it to say that we have carefully reviewed each and every one of these contentions and we do not believe that, taken together or separately, they were sufficient to show that the appellants were unduly prejudiced.

We are convinced that Judge ULLMAN retained his composure exceptionally well in a long drawn out, hard fought trial. We are also convinced that the evidence was sufficient to justify the conviction of all appellants and that they received a fair trial.

Judgments of sentence are affirmed and the defendants are directed to appear in the court below at such time as they may be there called, and that they be by that court committed until they have complied with the sentences, or any part of them which had not been performed at the time the appeals were made a supersedeas.

MONTGOMERY, *J.*, concurs in the result.

WATKINS, *J.*, files a dissenting opinion.

APPENDIX D.

DISSENTING OPINION OF WATKINS, J. OF THE SUPERIOR COURT OF PENNSYLVANIA.

FILED: March 19, 1964

DISSENTING OPINION BY WATKINS, *J.*

I would arrest the judgments of sentence and discharge the defendants on the ground that although the indictment found alleges a corrupt conspiracy within the statutory period in that the last overt act was committed on September 19, 1957, the evidence of the Commonwealth shows that the last overt act that extended the existence of the alleged conspiracy took place on September 16, 1957, which was beyond the statutory period. The proof of the Commonwealth is that a check was made by the Union to Joseph E. Grace, one of the defendants, since deceased, on September 16, 1957 and that it was presented for payment and paid by the Broad Street Trust Company, the drawee, on September 19, 1957 and that this payment was the overt act in furtherance of the conspiracy and within the statute of limitations.

The check in question was dated September 16, 1957 payable to Joseph E. Grace, drawn on the Broad Street Trust Company, Philadelphia, Pa., in the amount of $2500. The maker was Highway Truck Drivers & Helpers, Local 107, Raymond Cohen, Secretary, Joseph E. Grace, President, and delivered to Grace on the date it was made. The check which was introduced into evidence was indorsed in blank by Joseph E. Grace and was paid by the bank on September 19, 1957.

We agree with the majority opinion that a check or draft does not operate as an assignment of funds in the hands of the drawee bank but we are not interested in the drawee, we are only interested in the maker and the payee. The delivery of this negotiable instrument into the hands of Grace became a completed transaction and, if a part of this alleged corrupt conspiracy, a completed overt act, a completed crime. This check was a thing of value, a negotiable instrument that could be negotiated at any time by delivery. He could do this by indorsing it in blank and delivering it to anyone. If, as contended by the Commonwealth, the convention payments constituted illegal acts, and part of the conspiracy, the crime was completed on the delivery of the check.

The Commonwealth proved the making and the delivery of the check to Grace on September 16, and from then on what happened to this "bearer" instrument is pure conjecture, even if material. The evidence shows that the Broad Street Trust paid out the money on a bearer instrument but there is no evidence to whom it was paid and it is pure guesswork to argue that it was paid to Grace.

There is no statute, regulation or duty which prevents a bank from making payment of a check to someone other than the indorser where the check is a bearer instrument without requiring the indorsement of the person who presents it. Uniform Commercial Code, 12A, PS § 4, Banks, Deposits & Collections. "An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to orde and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed." Uniform Commercial Code, 12A, PS § 3-204.

The delivery of the negotiable instrument in the form of this check is exactly the same as if it were cash or a negotiable bearer bond. A check is a chattel, a valuable security. Com. v. Rosicci, 199 Pa. Superior Ct. 609-616. The overt act was then complete and what happened when the

check was negotiated is immaterial, exactly the same as evidence of what was done with the cash or the bond or its proceeds, unless, of course, there was evidence that the proceeds were divided among conspirators, which doesn't appear in this case.

This Court held in Com. v. Petrosky, 194 Pa. Superior Ct. 94, 166 A. 2d 682 (1960), that a delivery of a check by the State Treasurer to the Postmaster in Dauphin County was sufficient delivery to the defendant to establish the commission of a crime in that county so that the overt act was complete at that time. We specifically held that the overt act was the delivery of the check, the postmaster being the agent of the defendant and the fact that the check's ultimate delivery and cashing took place in another county was not material.

This Court held that a prosecution for criminal conspiracy could be brought in the county where the unlawful combination took place or in any county where an overt act was committed by any of the conspirators in furtherance of that unlawful conspiracy. Com. v. Prep, 186 Pa. Superior Ct. 442, 142 A. 2d 460 (1958): "An overt act is distinguished from that which rests merely in intention or design; and as used in the law of conspiracy it means an act done in furtherance of the object of the conspiracy." Com. v. Mezick, 147 Pa. Superior Ct. 410, 413, 24 A. 2d 762 (1942). The overt act in the Prep case was the delivery of a commonwealth check, payable to Prep, to the postmaster; that the postmaster was the agent of Prep so that delivery to him was delivery to Prep. And we said at page 449, "This relationship between Prep and the Commonwealth as parties to the cinder contract forms the basis for the only logical conclusion that the transaction was completed when the checks were mailed."

The overt act in the instant case was the delivery of the check to the defendant on September 16, so that an indictment handed down on September 18, charging a conspiracy that depended on the overt act of the Grace check to extend the conspiracy was too late.

It should be pointed out that with all the charges that have been bandied about for months through the communications media concerning the gross corruption of Cohen in Local 107, it is regretful, to say the least, that the successful prosecution of this conspiracy depends on the acceptance of alleged excessive convention expenses within the statutory period and that requiring a judicial determination whether within or without by one day.

As we said in Com. v. Fabrizio, 197 Pa. Superior Ct. 45, 58, 176 A. 2d 142 (1961): "Conspiracy, because of its peculiarly broad application, has come to be used as a catch-all crime, especially in those cases where the prosecution has great difficulty in proving a specific crime . . . Because of the nature of the crime of conspiracy, it is, therefore, necessary that indictments charging it should be strictly construed as to the date and incidents of the conspiracy, especially as to the application of the statute of limitations."

APPENDIX E.

PETITION FOR CONTINUANCE IN THE SUPERIOR COURT OF PENNSYLVANIA.

(Filed July 19, 1963.)

To the Honorable, the President Judge and Judges of the Superior Court:

The petition of all the appellants by their attorneys respectfully represents:

1. This case consists of six appeals filed by all of the defendants convicted under Bill of Indictment #520, Quarter Sessions Court of Philadelphia, September Sessions, 1959, charging the six defendants (and a seventh, who died before the trial) with conspiracy to cheat and defraud.

2. On July 15, 1963, each of the petitioners was sentenced by the Honorable David L. Ullman, sitting in the Court of Quarter Sessions of Philadelphia County, to a term of imprisonment in the Eastern State Correctional Institution.

3. Immediately after the court had pronounced sentence, counsel for each defendant requested the sentencing judge to admit the defendants to bail and to grant a supersedeas pending the filing and disposition of an appeal to this Honorable Court. These motions were refused.

4. On July 15, 1963, petitioners immediately perfected their appeals to this Court and submitted petitions for special allowance of supersedeas. These appeals were docketed as of the above term and numbers.

5. After due consideration of the petitions and discussion with counsel for petitioners and with Arlen Specter, Assistant District Attorney of Philadelphia County, who prosecuted the case in the trial court, the Honorable Gerald F. Flood granted petitions, admitting petitioners to bail and granted supersedeas as to each petitioner.

6. The appeals are scheduled to be heard before this Court at the opening of the session commencing September 9, 1963.

7. The trial in the court below lasted ten weeks and one day (March 25, 1963, to June 3, 1963); timely motions for new trial and for arrest of judgment were filed. The trial court ordered that all supplementary reasons for those motions be filed by June 17, 1963 and briefs be filed by July 3, 1963. Argument was heard on the motions July 10, 1963, and the motions were denied July 15, 1963. The action of the trial court in refusing bail or supersedeas thereby compelled petitioners to file immediate appeals, thus denying them the forty-five days prescribed by law to perfect their appeals.

8. Petitioners aver that it is virtually impossible for counsel to prepare briefs and to print the record and briefs by August 26, 1963, as required by the rules of this Court.

9. Counsel has inquired of the three largest legal printers in the Philadelphia area and have been informed that it print the record in this case (over 4,500 pages) would take between eight and sixteen weeks. Copies of the letters

from each of those printers are attached hereto as Exhibits "A", "B" and "C".

10. Counsel have been continuously engaged on this case since the middle of February 1963; have given virtually full time to its preparation and trial, and since the trial ended (midnight, June 3, 1963) to the preparation of motions, reasons and supplemental reasons for those motions, briefs in support of those motions, preparation for and oral argument July 10, 1963, preparation of appeal and petitions for supersedeas, almost to the exclusion of all other office matters. Morton Witkin, counsel for Appellant Ben Lapensohn, additionally avers that he is scheduled to commence trial in the United States District Court for the Eastern District of Pennsylvania on September 9, 1963, in the case of *United States of America v. George Barrow, et al.* which has been specially listed for trial at that time by order of that court. A letter from the United States Attorney advising of this listing is attached hereto as Exhibit "D". There are a large number of defendants and counsel in that case. That case has been previously continued because of Counsel Witkin's engagement in this trial. It has been estimated by the United States Attorney that this case will take more than one month to try.

11. Petitioners therefore aver that there is not sufficient time for counsel to have the record and briefs printed or to be adequately prepared to argue the matter when scheduled on September 9, 1963.

12. Appellants BERMAN, ELCO, HARTSOUGH and WALKER cannot afford to print the record themselves and will be forced to rely upon the record printed by the other appellants or proceed under Rule 52; not all counsel have typed copies of the record which will further delay preparation of their arguments.

WHEREFORE, it is respectfully requested the above matter be continued to the list of December 1963.

Respectfully submitted,

/s/ ABRAHAM J. BREM LEVY,
Abraham J. Brem Levy,
Attorney for Raymond Cohen, Appellant in No. 273.

/s/ JOSEPH P. MCLAUGHLIN,
Joseph P. McLaughlin,
Attorney for John Joseph Elco, Appellant in No. 274.

/s/ JOHN PATRICK WALSH,
John Patrick Walsh,
Attorney for Joseph E. Hartsough, Appellant in No. 275.

/s/ BERNARD L. LEMISCH,
Bernard L. Lemisch,
Attorney for Abraham D. Berman, Appellant in No. 277.

/s/ MORTON WITKIN,
Morton Witkin,
Attorney for Ben Lapensohn, Appellant in No. 278.

[Affidavit]

EXHIBIT "A".

THE LEGAL INTELLIGENCER
Established 1843
10 South 37th Street, Philadelphia 4, Pa.

July 17, 1963

Abraham J. Brem Levy, Esq.
1328 Land Title Building
Philadelphia 10, Pa.

Dear sir:

In response to your inquiry, we are sorry to inform you that we would not be able to print the Record approximating 4,800 pages in time for filing, for the Supreme Court session beginning September 9, 1963.

Approximately 50 working days would be needed to set the type and another eight working days for printing and binding. Therefor the total time needed for producing this job would be 12 weeks, which means that delivery would not be made until sometime in October.

If we can be of any further help in this matter do not hesitate to call on us.

Very truly yours,

THE LEGAL INTELLIGENCER
/s/ By R. G. EKLUND
Rune G. Eklund

RGE:wbt

EXHIBIT "B".

MURRELLE PRINTING COMPANY
Incorporated
Law Printers Since 1903
Sayre, Pennsylvania
Phone TUrner 2-0401

July 16, 1963

Abraham J. Levy, Esq.
1328 Land Title Building
Philadelphia 10, Pennsylvania

Re: Super or Court of Pennsylvania—Cohen appeal

Dear Mr. Levy:

This will confirm our conversation with your office of today in connection with the printing of a 4800 page record and a brief of 50 to 60 pages. Our charges are presently $2.68 per page for records on appeal to the Pennsylvania State Courts and $2.88 per page for the briefs. Of course, these page rates do not include difficult composition such as tabular matter nor exhibits which are reproduced by photo offset process.

It is extremely difficult to tell exactly how long will be needed for a record of this size inasmuch as the time element depends substantially on the amount of work on hand at the time any particular record is received. Ordinarily at least eight weeks should be allowed to turn out a record of this size together with the brief.

If you could give us an idea of when the work would be available, it might be possible for us to give you a more exact time schedule. We would indeed be glad to be of

service to you in this case and to place our experience at your disposal.

Cordially yours,

MURRELLE PRINTING COMPANY
/s/ ALLAN P. FURMAN
Allan P. Furman

APF:do

Publishers of the Official Advance Reports and Pennsylvania State and Superior Court Reports

EXHIBIT "C".

Established 1895 SAratoga 7-8711

INTERNATIONAL PRINTING CO.
711 South 50th Street
Philadelphia 43, Pa.

July 17, 1963

Morton Witkin, Esq.
911 Finance Building
Philadelphia 2, Penna.

Re: *Commonwealth v. Berman, et al.*
Appeal of Ben Lapensohn
Superior Court of Penna.

Dear Mr. Witkin:

We take pleasure in quoting you a price of $5.50 per page for printing 50 copies of the Record on Appeal in the case of Commonwealth v. Berman, et al.

We understand that the record will be in excess of 2,500 printed pages. The time required for printing would be at least 8 to 10 weeks, even if we subcontract part of the typesetting and work overtime at extra cost. Otherwise the normal time would be about 15 or 16 weeks.

Yours very truly,

International Printing Co.
/s/ H. H. PAKRADOONI, JR.
H. H. Pakradooni, Jr.

HHP/J

EXHIBIT "D".

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
Eastern District of Pennsylvania
Fourth Floor, U. S. Courthouse
Ninth and Market Streets
Philadelphia 7, Pa.

Address Reply to
United States Attorney
and Refer to
Initials and Number
DJTO'K:TFMcB:GEM
53694

June 27th, 1963.

UNITED STATES OF AMERICA

— *vs.*

GEORGE BARROW, a/k/a
"Skinny Barrett"

No. 20997

The above-entitled case has been listed for trial on MONDAY, SEPTEMBER 9th, 1963, AT 10:00 A. M., *by the Court,* and will appear as the first case on the trial list for that date.

All defendants and counsel are to be ready to proceed to trial on that date.

Very truly yours,
/s/ DREW J. T. O'KEEFE
Drew J. T. O'Keefe
United States Attorney

Mr. McBride—Wash., D. C.

Notice sent to:
Defendants and
Agt. David Walker, F. B. I.
Wabash Fire and Casualty Co., surety
Morton Witkin, Esq.,

APPENDIX F.

PETITION FOR CONTINUANCE IN THE SUPERIOR COURT OF PENNSYLVANIA

(Filed August 13, 1963.)

To the Honorable, the President Judge and Judges of the Superior Court:

The petition of appellants, Ben Lapensohn, by his attorney, Morton Witkin, Esquire, and Raymond Cohen, by his attorney, Abraham J. Brem Levy, Esquire, respectfully represents that:

1. On Friday, July 19, 1963, appellants joined with other appellants in this matter, in the petition for continuance of this appeal to the December, 1963 List, on the grounds that, *inter alia*, the length of time for which counsel had been engaged in this case, the magnitude of the record, the numerous, intricate and substantial questions of law involved, the mechanical difficulties involved in printing the record, and the anticipated engagement of counsel, Morton Witkin, in another case, would prevent the proper preparation and printing of briefs and the record within the times allowed.

2. On Saturday, July 20, 1963, this Court refused the petition for continuance, and ordered the case to be argued on the original record, and further ordered the printed record to be filed as promptly as possible after arguments.

3. In that petition, Morton Witkin, counsel for appellant, Ben Lapensohn, had further averred that he was scheduled to commence trial in the United States District Court for the Eastern District of Pennsylvania, on Septem-

ber 9, 1963, at 10:00 A. M., in the case of the *United States of America v. George Barrow, et al.*, which case had been specially listed for trial at that time by order of the District Court on or prior to June 27, 1963. A copy of the letter from the United States Attorney informing counsel of that Court's order was attached to the petition. The District Attorney, in his answer to the petition objecting to the continuance, averred:

> "10. The engagement of Morton Witkin, counsel for Appellant Ben Lapensohn, need not interfere with the listing of this case for argument in the Superior Court on September 9th. Thomas F. McBride, Special Attorney for the Department of Justice who is assigned to try *United States v. Barrow*, advised Arlen Specter that he has no objection to starting that case on September 9, 1963 after Mr. Witkin has had an opportunity to argue in the Superior Court. Mr. McBride further advised that September 9, 1963 is the start of the criminal session in the Federal Court and that preliminary call ordinarily consumes approximately two hours that morning. According to Mr. McBride, Stanford Shmukler, Esq., co-counsel with Mr. Witkin, could handle the preliminaries until Mr. Witkin arrived. While Mr. McBride's agreements are subject to the approval of the District Court, the Superior Court of Pennsylvania has preference in calling a case in which Mr. Witkin is counsel over the District Court, especially since the Superior Court case can be disposed of without interfering with the trial of the District Court matter. While it is admitted that defense counsel were extensively engaged in the trial and preparation of this case, such allegations are irrelevant to the Petition for Continuance."

On August 6, 1963, Morton Witkin endeavored to confirm the agreement with Mr. McBride, set forth in Mr.

Specter's Answer to the Petition for Continuance. As a result thereof, Thomas F. McBride set forth his position in connection therewith by letter dated August 6, 1963, copy of which is attached hereto and marked Exhibit "A". Immediately thereafter, Morton Witkin forwarded copy of Exhibit "A" to the Honorable Harold K. Wood, Judge of the District Court in charge of the Criminal Calendar for the term commencing September 9, 1963, wherein, in effect, Morton Witkin asked for a continuance of a day or two so as to permit him, Morton Witkin, to comply with the order of this Court, and to appear before this Court to argue this appeal, which had been listed by the Court as the first case on the list commencing September 9, 1963.

As a result of that communication, the Honorable Harold K. Wood, in reply thereto, forwarded to Morton Witkin a letter dated August 8, 1963, denying the application for continuance, a copy of which is attached hereto and marked Exhibit "B".

Morton Witkin further avers that, contrary to the statement contained in the District Attorney's answer, Stanford Shmukler, Esquire, was not co-counsel with Morton Witkin in the representation of the defendants he then represented, nor is Stanford Shmukler now co-counsel with Morton Witkin in Morton Witkin's representation of George Barrow, the only defendant Morton Witkin presently represents, although Stanford Shmukler did enter his appearance on August 1, 1963 on behalf of one of the other defendants in that case. Without the appearance of Morton Witkin, George Barrow would be without counsel in that case.

4. To date, the Trial Judge, the Honorable David L. Ullman, has not filed an Opinion, as required by Rule 43 of this Court, nor has the Official Court Stenographer filed the Notes of Testimony as required by that Rule, even though the Stenographer had furnished counsel with a copy of these Notes of Testimony.

5. Counsel further aver that, despite most diligent effort and almost exclusive attention to the preparation of this case, to the exclusion of many other important matters, and despite the utilization of assistance to the preparation of the Briefs, it is mentally and physically impossible for counsel to adequately brief the numerous, intricate and substantial issues raised in this case, within the time allotted under the Rules of this Court, particularly without the Opinion of the lower Court.

6. It is respectfully submitted that refusal of this continuance wil deprive appellants of the effective assistance of counsel, guranateed to them by the Constitutions of the United States and the Commonwealth of Pennsylvania.

WHEREFORE, it is again respectfully requested that the above matter be continued to the List of December, 1963.

Oral argument is respectfully requested on this petition.

Respectfully submitted,

/s/ MORTON WITKIN,
Morton Witkin,
Attorney for Ben Lapensohn,
Appellant in No. 278.

/s/ ABRAHAM J. BREM LEVY,
Abraham J. Brem Levy,
Attorney for Raymond Cohen,
Appellant in No. 273.

[Affidavit]

EXHIBIT "A".

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C.

August 6, 1963

Address Reply to the
Division Indicated
and Refer to Initials and Number
TFMcB:sn

Morton Witkin, Esquire
Witkin & Egan
1416-18 South Penn Square
Philadelphia 2, Pennsylvania

Dear Mr. Witkin:

As you know, the trial of the case of *United States* v. *Barrow, et al.*, has been listed for trial on September 9, 1963, at 10:00 a.m. Notices were sent out in June, with the approval of the Court, notifying all counsel and defendants to be ready for trial on that date. The Government will be ready for trial at that time.

Subsequent to the sending of the notices Philadelphia Assistant District Attorney Arlen Spector called me in Washington and advised me that he intended to ask for listing for argument of the case of *Commonwealth* v. *Raymond Cohen, et al.*, before the Superior Court on September 9th at 10:00 a.m. Mr. Spector indicated that you represented one of six or seven defendants. I told Mr. Spector of the trial listing of the *Barrow* case for that date and Mr. Spector advised me that the argument of the *Cohen* case should take no more than an hour or two of your time.

I told Mr. Spector I would not object to a one or two hour adjournment or recess in the *Barrow* case (noting that Stanford Shmukler, whom I understood was your co-counsel, could handle the first calendar calls), to accom-

modate him and yourself *but only if* such adjournment or recess were agreeable to the District Court Judge responsible for the assignment and scheduling of the *Barrow* case.

cc: Mr. Drew J. T. O'Keefe
United States Attorney
Philadelphia, Pennsylvania

—2—

I am today advised by you that the *Cohen* case has been listed before the Superior Court for September 9th and that you anticipate the argument of the *Cohen* case to consume one or two *days* of your time. I most certainly would oppose any adjournment or recess of such length in the *Barrow* case; the case involving, as it does, fourteen defendants, ten or more lawyers, numerous witnesses and considerations of the District Court's criminal trial schedule.

You have suggested that we speak to Judge Harold K. Wood, the presiding Judge at the forthcoming trial term and I think this suggestion wise. I am leaving, however, on vacation tomorrow and will be away the rest of this week and next week, except for August 14th.

I intend to be in Philadelphia on August 14th and perhaps, if the Judge's schedule and your schedule permits we could see the Judge and resolve this problem on that date.

I will call you on August 13th to determine if you have been able to secure an appointment with Judge Wood on the 14th. If you find you cannot, you have my consent to your speaking to Judge Wood in my absence since I believe this letter sets forth my position.

I am mailing a copy of this letter to the United States Attorney and you may advise Mr. Shane Creamer of your appointment with Judge Wood if I am unavailable.

Sincerely,

/s/ Thos. F. McBride
Thomas F. McBride
Special Attorney, Dept.
of Justice

EXHIBIT "B".

UNITED STATES DISTRICT COURT
Eastern District of Pennsylvania
Philadelphia 7

August 8, 1963

Chambers of
HAROLD K. WOOD
Judge

Morton Witkin, Esq.
911 Finance Building
1416-18 South Penn Square
Philadelphia 2, Pennsylvania

Re: *United States v. Barrow, et al.*
Criminal No. 20997

Dear Mr. Witkin:

This case is listed for trial on September 9, 1963, at 10 a.m., and as of this moment will be assigned to Judge Joseph S. Lord, III, providing that is acceptable to him.

It will not be continued under any circumstances of which I am aware at this time. According to procedure in this Court this case was attached in June of this year. If in accordance with your letter of August 7 there is some conflict between the trial in this Court and the argument in the Superior Court of Pennsylvania, we will expect you to apply to that Court for a continuance or engage some other attorney to argue the matter. The case in this Court must and will be tried.

It is my personal hope that this will not cause you any difficulty or embarrassment, but I am accepting your letter of August 7 as an application for continuance, which is denied.

Very truly yours,

/s/ HAROLD K. WOOD
Harold K. Wood
Judge

cc: Hon. Joseph S. Lord, III
Thomas F. McBride, Esq.
Angelo D. Malandra, Esq.
Samuel Kenin, Esq.
Hon. Drew J. T. O'Keefe
Louis Lipschitz, Esq.
James F. Masterson, Esq.
Joseph Smukler, Esq. [sic]
(*should be Stanford Shmukler, Esq.*)

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964 No. 419

BEN LAPENSOHN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

October Term, 1964 No. 420

RAYMOND COHEN, JOHN JOSEPH ELCO, JOSEPH E. HARTSOUGH, ABRAHAM D. BERMAN, *Petitioners*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

APPENDIX TO BRIEFS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

ARLEN SPECTER
Assistant District Attorney

F. EMMETT FITZPATRICK, JR.
First Assistant District Attorney

JAMES C. CRUMLISH, JR.
District Attorney

Room 666, City Hall
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

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COMMONWEALTH'S ANSWER TO [First] PETITION FOR CONTINUANCE

IN THE SUPERIOR COURT OF PENNSYLVANIA

October Term, 1963, Nos. 273, 274, 275, 277, 278

COMMONWEALTH OF PENNSYLVANIA

vs.

RAYMOND COHEN, JOHN JOSEPH ELCO, JOSEPH E. HARTSOUGH, ABRAHAM D. BERMAN and BEN LAPENSOHN

To the Honorable, the President Judge and Judges of the Superior Court:

The Commonwealth of Pennsylvania, through its attorneys, James C. Crumlish, Jr., District Attorney, and Arlen Specter, Assistant District Attorney, of the City and County of Philadelphia, answers the Petition for Continuance:

The Commonwealth vigorously opposes the application for continuance on the ground that the public interest requires a prompt disposition of these appeals. The defendants were convicted of conspiracy to cheat and defraud Local 107 of the Teamsters Union. Pending the outcome of this appeal, Raymond Cohen continues to act as the chief executive officer of Local 107 through the position of Secreary-Treasurer, through which he has access to the Union's treasury; Edward F. Walker continues to act as a Business Agent, and Recording Secretary.

James R. Hoffa, President of the International Teamsters Union, has publicly announced that he will not remove these officers pending the outcome of these appeals. The Labor Management Reporting and Disclosure Act of 1959, which prohibits any person, who has been convicted of a conspiracy to commit such an offense, from holding Union office, does not apply until "the date of the final sustaining of such judgment on appeal." 29 U.S.C.A. 504(c).

Local 107 consists of approximately 12,500 members; it is extremely important to commercial and industrial activity in the Delaware Valley area and the Commonwealth of Pennsylvania; and the public interest requires that this case be determined promptly so that the policy of the Federal legislation may be effectuated if the convictions are upheld.

The Commonwealth of Pennsylvania answers the specific allegations as follows:

1, 2, 3, 4, 5, 6. Admitted.

7. Petitioners were not denied forty-five days prescribed by law to perfect their appeals. The Trial Judge properly exercised his discretion in refusing bail pending the filing of an appeal. The defendants chose to file an immediate appeal in order to remain at liberty on bail. This procedure was proper, lawful and in accordance with the established practice. The remaining averments of paragraph 7 are admitted.

8. Denied. Donald Wolk, Secretary of Goodway Printing Company, Philadelphia, Pennsylvania, advised Arlen Specter, the Trial Assistant District Attorney and the affiant to this Answer, that Goodway Printing Company could print the record in ample time to meet the filing requirements of the Superior Court. Defendants have written briefs in the lower Court and there is ample time to expand those briefs for timely submission to the Superior Court.

9. Defense counsel have advised Assistant District Attorney Arlen Specter that they believe portions of the record need not be printed, which is true. After the record is reduced, the minimum estimate of eight weeks (as alleged in the Petition for Continuance) would be similarly reduced, thus leaving ample time for the printing of the record by the printers whom defendants have contacted.

10. The engagement of Morton Witkin, counsel for Appellant Ben Lapensohn, need not interfere with the list-

ing of this case for argument in the Superior Court on September 9th. Thomas F. McBride, Special Attorney for the Department of Justice who is assigned to try *United States v. Barrow*, advised Arlen Specter that he has no objection to starting that case on September 9, 1963 after Mr. Witkin has had an opportunity to argue in the Superior Court. Mr. McBride further advised that September 9, 1963 is the start of the criminal session in the Federal Court and that preliminary call ordinarily consumes approximately two hours that morning. According to Mr. McBride, Stanford Shmukler, Esq., co-counsel with Mr. Witkin, could handle the preliminaries until Mr. Witkin arrived. While Mr. McBride's agreements are subject to the approval of the District Court, the Superior Court of Pennsylvania has preference in calling a case in which Mr. Witkin is counsel over the District Court, especially since the Superior Court case can be disposed of without interfering with the trial of the District Court matter. While it is admitted that defense counsel were extensively engaged in the trial and preparation of this case, such allegations are irrelevant to the Petition for Continuance.

11. Denied for reasons set forth extensively above.

12. Respondent is without knowledge or information concerning the allegations of paragraph 12.

WHEREFORE, the Commonwealth of Pennsylvania prays that:

1. The Petition for Continuance be dismissed with the direction that the briefs and record be filed in accordance with the Rules of Court;

2. In the alternative, that the Petition for Continuance be dismissed with leave to file the printed record as promptly as possible, but after the 26th of August;

3. That the Petition for Continuance be dismissed with leave for the appeal to be heard on the typewritten record,

in view of the urgent public interest in disposing of the appeal.

Respectfully submitted,

/s/ ARLEN SPECTER
Assistant District Attorney

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF PHILADELPHIA : *ss:*

ARLEN SPECTER, being duly sworn according to law deposes and says that he is an Assistant District Attorney in and for the County of Philadelphia, that he is authorized to take this affidavit on behalf of the Commonwealth, and that the facts set forth in the foregoing Answer to Petition for Continuance are true and correct to the best of his knowledge, information and belief.

/s/ ARLEN SPECTER
Assistant District Attorney

Sworn to and subscribed
before me this 19th
day of July, 1963.

/s/ MILTON S. LOGAN
Notary Public

My Commission Expires
March 1, 1964

COMMONWEALTH'S ANSWER TO [Second] PETITION FOR CONTINUANCE

IN THE SUPERIOR COURT OF PENNSYLVANIA

October Term, 1963, Nos. 273, 278

COMMONWEALTH OF PENNSYLVANIA

vs.

RAYMOND COHEN and BEN LAPENSOHN

To the Honorable, the President Judge and Judges of the Superior Court:

The Commonwealth of Pennsylvania, through its attorneys, James C. Crumlish, Jr., District Attorney, and Arlen Specter and Gordan Gelfond, Assistant District Attorneys, of the City and County of Philadelphia, answers the Petition for Continuance, filed August 13, 1963, as follows:

The essence of the Commonwealth's opposition, set forth more extensively below, is:

I. The public interest demands that there be a prompt disposition of the appeals from the joint trial of defendants Raymond Cohen, Ben Lapensohn, Edward F. Walker, Abraham D. Berman, Joseph E. Hartsough and John J. Elco so that, if the convictions are upheld, defendants Cohen, Walker and Berman will be barred from holding Union office thereafter, which they continue to hold pending the disposition of these appeals under the Federal Landrum-Griffin Act;

II. The engagement of Morton Witkin, Esq. (counsel for Ben Lapensohn) in the Federal District Court does not take precedence over a case in the Superior Court of Pennsylvania, since this appellate tribunal has specially listed this case for disposition No. 1 on the list of September 9. Aside from the customary preference accorded to the Superior Court, this Court should insist on its superior

status as an appellate court, since the argument involving Mortin Witkin will be allotted only one hour (thirty minutes for each side) and will not, realistically viewed, interfere with the trial of the case in the Federal Court which would probably not start, in any event, until the late morning of September 9;

III. The engagement of Morton Witkin, at most, involves only the appeal of Ben Lapensohn (No. 278) and should in no way affect the disposition of the five other appeals;

IV. The appeals of Cohen and Lapensohn—and especially that of Cohen, who continues to act as the chief executive officer of Local 107 with access to the Union's treasury—should not be severed from the appeals of Abraham D. Berman, John J. Elco, Joseph E. Hartsough and Edward F. Walker, who have not joined in the current Petition for Continuance and whose appeals are still listed on September 9, 1963.

* * * * *

The Commonwealth vigorously opposes the application for continuance and reiterates what has been previously stated in the Commonwealth's Answer to an earlier Petition for Continuance in this matter:

The defendants were convicted of conspiracy to cheat and defraud Local 107 of the Teamsters Union. Pending the outcome of this appeal, Raymond Cohen continues to act as Secretary-Treasurer of Local 107, Edward F. Walker continues to act as a Business Agent and Recording Secretary and Abraham D. Berman continues to act as a Business Agent. James R. Hoffa, President of the International Teamsters Union, has publicly announced that he will not remove these officials pending the outcome of these appeals. The Labor Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), which prohibits any person, who has been convicted of a conspiracy to commit an offense, from holding Union office, does not apply until "the

date of the final sustaining of such judgment on appeal". 29 U.S.C.A. 504(c).

Local 107 consists of approximately 12,500 members; it is extremely important to commercial and industrial activity in the Delaware Valley area and the Commonwealth of Pennsylvania; and the public interest requires that this case be determined promptly so that the policy of the Federal legislation, barring defendants from holding Union offices, may be effectuated if the convictions are upheld.

* * * * *

All of the reasons presently assigned for a continuance have, in essence, been fully considered and rejected by your Honorable Court.

The Commonwealth of Pennsylvania answers the specific allegations as follows:

1. It is admitted that petitioners filed a previous application for a continuance. Those reasons for the prior Petition, as set forth in paragraph 1 of the current Petition, demonstrate that this Court has previously ruled adversely to petitioners on all reasons now advanced.

2. It is admitted that the prior Petition for Continuance was denied by the Superior Court, which decision is res judicata and constitutes a complete disposition on the merits which governs the current Petition.

3. The recital as to the averments of the former Petition for Continuance and the Answer of the Commonwealth to said Petition, referred to in paragraph 3, are admitted.

It should be noted from the letter of Judge Harold K. Wood (Exhibit B to the new Petition) that Judge Wood stated:

> "We will expect you to apply to that Court (referring to the Superior Court of Pennsylvania) for a continuance . . ."

Thus, Judge Wood apparently did not know that this Court had already refused a Petition for Continuance, and it is not apparent from the face of the Petition what facts were presented to Judge Wood since Mr. Witkin's letter of August 7 is not attached to the Petition.

The allegations in the Petition . . . to the effect that the United States Attorney of the Department of Justice, Thomas F. McBride, now opposes a continuance in the Barrow case, and to the effect that the Honorable Harold K. Wood, in charge of the listing of criminal cases in the United States District Court for the month of September 1963, has denied Mr. Witkin's application for a continuance . . . were predicated upon a statement by Mr. Witkin in a letter to the United States Attorney that the argument of the appeal now before your Honorable Court would consume one or two days of Mr. Witkin's time [see letter attached to Petition for Continuance]. The opposition to any adjournment or recess of the Barrow case was based on Mr. Witkin's request for an adjournment of one or two days.

It is specifically denied that there is any requirement for an adjournment of the Barrow case in the United States District Court, wherein Mr. Witkin is one of counsel, for a period of more than one or two hours at most. Arrangements can be made for Mr. Witkin to present his oral argument to your Honorable Court in behalf of his client, Ben Lapensohn, immediately after the opening of court at 10:00 A.M. on September 9, 1963. Such oral argument should be fully concluded within one hour or two hours at most, assuming your Honorable Court will grant that longer period of time for the presentation of argument in Lapensohn's appeal. As averred in the earlier Answer to the Petition for Continuance quoted in the present Petition the United States Attorney, Mr. McBride, had no objection to permitting Mr. Witkin to appear before your Honorable Court on the morning of September 9, 1963 and present his argument, since there are preliminary matters to be taken care

of on the opening day of the session of the United States District Court, and the trial itself would not commence until Mr. Witkin had fully concluded all oral argument he may desire to present to your Honorable Court by noon of September 9 at the latest. The present refusal of a continuance by the Judge of the United States District Court is predicated on Mr. Witkin's assertion that he will be required to consume one or two days in the presentation of his argument before your Honorable Court, a statement which was wholly unwarranted and unjustified.

It is further averred that the appearance of Morton Witkin, Esq., before your Honorable Court on the morning of September 9, 1963 for the time necessary to present his oral argument in behalf of defendant Ben Lapensohn will in no way deprive his client, George Barrow, of representation by counsel at his trial in the United States District Court.

4. The defendants have had the notes of testimony on a daily basis since the commencement of the trial, and therefore have had the complete notes of testimony in this case since June 4, 1963. The opinion of Honorable David L. Ullman is not yet due. In any event, the defendants are in no way prejudiced from asserting their allegations of error without the filing of Judge Ullman's opinion. The Commonwealth is further advised that the original notes of testimony have been transcribed and certified and filed with the Clerk of Quarter Sessions Court for transmittal to your Honorable Court.

5. It is specifically denied that counsel for appellants will be unable to adequately brief the matters they desire to present for consideration to your Honorable Court within the allotted time. On the contrary, every issue in this matter has been fully argued before the Court below. Counsel for all defendants, including counsel for the present petitioners, filed extensive and elaborate briefs in connection with their motions for new trial and in arrest of judgment

and numerous issues were fully argued in the Court below. The Commonwealth knows of no issues in this case which have not been already fully briefed and argued. The preparation of the brief in the present appeal and the presentation of argument in behalf of appellants can be readily prepared in time for argument with no extraordinary demands upon counsel for appellants.

6. The Superior Court of Pennsylvania carefully considered the constitutional rights of all the defendants in denying the previous Petition for Continuance, and none of the rights of defendants will be infringed upon in view of the adequate time for preparation between July 15, the date the appeals were taken, and the September Session of the Superior Court.

WHEREUPON, the Commonwealth of Pennsylvania prays that:

A. The Petition for Continuance be denied, there being no matters now presented which were not fully considered by your Honorable Court in connection with the earlier Petition;

B. Or in the alternative, that the Petition for Continuance filed on behalf of Raymond Cohen herein be denied so that his appeal may be disposed of along with the appeals of John J. Elco (No. 274), Joseph E. Hartsough (No. 275), Edward F. Walker (No. 276) and Abraham D. Berman (No. 277) who have not joined in this Petition.

Respectfully submitted,

GORDON GELFOND
Assistant District Attorney

ARLEN SPECTER
Assistant District Attorney

JAMES C. CRUMLISH, JR.
District Attorney

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF PHILADELPHIA : ss:

GORDON GELFOND, being duly sworn according to law, deposes and says that he is an Assistant District Attorney in and for the County of Philadelphia, that he is authorized to take this affidavit on behalf of the Commonwealth, and that the facts set forth in the foregoing Answer to Petition for Continuance are true and correct to the best of his knowledge, information and belief.

/s/ GORDON GELFOND

Sworn to and subscribed
before me this 15th day
of August, 1963.

/s/ MILTON S. LOGAN
Notary Public

My Commission Expires
March 1, 1964

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FILED
SEP 21 1964
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IN THE

Supreme Court of the United States

October Term, 1964

No. 420

RAYMOND COHEN,
JOHN JOSEPH ELCO,
JOSEPH E. HARTSOUGH,
ABRAHAM D. BERMAN,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF OF COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF IN OPPOSITION FOR RESPONDENT, THE COMMONWEALTH OF PENNSYLVANIA

Respondent, the Commonwealth of Pennsylvania, prays that the Petition for a Writ of Certiorari to review the Order of the Supreme Court of Pennsylvania, entered on May 27, 1964, be denied.

STATEMENT OF THE CASE

On September 18, 1959, seven officials and employees of Local 107 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America were indicted for conspiracy to cheat and defraud that Union. After extensive pre-trial proceedings, six defendants were brought to trial on March 25, 1963, with the action being

abated as to one defendant who had died. Extensive evidence was presented by the Commonwealth in a trial that lasted ten weeks and one day in which 98 witnesses testified and 1,116 exhibits were introduced into evidence. The printed record in this case, exclusive of exhibits, runs 4,540 pages. No defendant took the stand, and no evidence was presented on behalf of any defendant.

On June 3, 1963, the jury returned verdicts of guilty as to all the defendants. In due course, the defendants were sentenced to terms of imprisonment ranging from three to twenty-three months to one to two years, plus a fine of $500.00. These Petitioners were sentenced as follows:

1. Raymond Cohen, the secretary-treasurer and key figure in the conspiracy, was sentenced to one to two years in prison and fined $500.00.

2. Joseph E. Hartsough was sentenced to six to twenty-three months in prison.

3. John Joseph Elco was sentenced to 3 to 23 months in prison.

4. Abraham D. Berman was sentenced to 3 to 23 months in prison.

Following the conclusion of the trial, this procedural timetable followed:

1. Arguments on post-trial motions were heard on July 10, 1963.

2. Defendants' post-trial motions were dismissed on July 15, 1963 and the judgments of sentence were imposed.

3. Defendants appealed to the Superior Court of Pennsylvania on July 15, 1963.

4. On July 19, 1963 and August 13, 1963 defendants filed petitions for continuance in the Superior

Court. On July 19, 1963 and August 15, 1963 the Commonwealth of Pennsylvania filed Answers to those petitions opposing a continuance.* The Superior Court denied both petitions for continuance.

5. The Superior Court of Pennsylvania heard argument for a full day on September 9, 1963 in a session which began at 10 A. M. and ended at 4:50 P. M. with no other case being heard that day.

6. On March 19, 1964 the Superior Court of Pennsylvania affirmed all the convictions by a six to one vote, and a comprehensive 37 page opinion was filed by that Court dismissing all of defendants' allegations of error. *Commonwealth v. Cohen et al.*, 203 Pa. Super. 34 (1964). One Superior Court Judge dissented on narrow state-law-substantive grounds that the prosecution was barred by the Pennsylvania Statute of Limitations.

7. After the Supreme Court of Pennsylvania refused, in its discretion, to review this case, this Petition for a Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. This Case Presents No Federal Question and No Important Issue of Any Kind.

There is no legitimate federal question involved in this case. All of the issues raised by Petitioners in the Superior Court were argued in terms of substantive or procedural

* While the Petitioners printed copies of their applications for continuance at page 41a and 50a of the Joint Appendix to Petitions for Writ of Certiorari to the Supreme Court, Petitioners did not print the Commonwealth's Answers. So that this Court may have all the facts, the Commonwealth is including its Answers to those Petitions in a separate Appendix to Briefs In Opposition to Petitions For Writ of Certiorari, which is being filed with this Brief.

questions of Pennsylvania state criminal law. An examination of the specific issues raised in this Petition for Certiorari, set forth below, demonstrates that Petitioners are complaining about questions of state law which fall outside the ambit of jurisdiction of the Supreme Court of the United States.

As to these questions of state law, the Pennsylvania Superior Court has given these defendants their full day in (the Appellate) Court. Their numerous allegations of error have been comprehensively and conscientiously considered, and properly rejected.

The Pennsylvania Supreme Court refused to consider this case because there was not even any significant question of state law presented. Unlike the Supreme Court of the United States where four justices must concur before certiorari may be granted, the Pennsylvania Supreme Court will review a decision from the Pennsylvania Superior Court if any one of seven judges votes to do so. Pennsylvania Act of June 24, 1895, P. L. 212, § 7(e), 17 Purdon's Statutes 190. The lack of substance in Petitioners' complaints is indicated by the fact that not one of seven Pennsylvania Supreme Court Judges thought this case was worthy of review by that Court.

This case involves only a misdemeanor on which very moderate sentences were imposed, considering the nature of the conduct proved on the single bill of indictment charging conspiracy to cheat and defraud Local 107 of the Teamsters Union. This Court should not take time from its busy, crowded schedule to review this case which has a record in excess of 4,500 pages, where the Pennsylvania Superior Court has given full consideration to all the allegations of error on a case which, realistically viewed, involves only state-law issues.

II. The Specific Reasons Advanced by Petitioners Do Not Justify Review by This Court.

A. *Use of the District Attorney's Bill Was Proper; and in Any Event, It Involves Only a Question of State Law.*

It has long been settled that a defendant has no constitutional right to a preliminary hearing. *Lem Woon v. Oregon*, 229 U. S. 586 (1912). And approval of the procedure of instituting a criminal action on information filed by the prosecutor without a prior judicial determination of probable cause was reaffirmed in *Beck v. Washington*, 369 U. S. 541, 545 (1962). Petitioners have asserted that they had a right to a preliminary hearing under a Pennsylvania Act of Assembly, which is true as a general proposition subject to certain exceptions; and this case falls within one of the traditional exceptions under Pennsylvania law where no preliminary hearing need be held. The state law which governs the use of the District Attorney's Bill of Indictment is summarized in the opinion of the Pennsylvania Superior Court at pages 39 to 43 of 203 Pa. Super. There is no reason to summarize or restate the Pennsylvania law reviewed by the Superior Court in their opinion in this case. Applying Pennsylvania law on this subject to this case, the Pennsylvania Superior Court concluded that the District Attorney's bill of indictment was properly used. There is no federal question involved no matter what contortions are attempted to mold this hollow complaint into a Fourteenth Amendment issue.

The proceedings in the Pennsylvania Courts in this case, including the use of the District Attorney's Bill of Indictment, afforded Petitioners more than the minimum requirements of due process of law. As the record shows, Judge (then District Attorney) Victor H. Blanc obtained approval from the Court of Quarter Sessions, acting through President Judge Vincent A. Carroll, in securing

permission to present evidence to the Grand Jury without a preliminary hearing (10a). Judge Carroll's review of the District Attorney's action afforded Petitioners their first line of procedural protection. The Grand Jury then heard evidence for two days before returning the indictment in this case. These proceedings were, of course, only the preliminaries. Defendants were then tried by judge and jury with all of the traditional procedural safeguards.

Petitioners' current contention of prejudice is a phantom. At no time in the long trial or afterward have Petitioners claimed that they were surprised by any evidence at all or pointed to any harm caused by the absence of a preliminary hearing. On the contrary, the record shows Petitioners received notice, a chance to be heard, a full opportunity to defend themselves and all the other procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment.

B. *Petitioners Were Not Denied Due Process of Law by Sequestration of the Jury, Limitation on Peremptory Challenges, Introduction of Evidence, or the Trial Judge's Conduct.*

It is accepted federal, as well as Pennsylvania, practice for the trial judge to sequester the jury where the facts indicate that practice is necessary in order to insure a fair trial. Keeping the jury together is certainly not violative of due process of law. The facts before the Trial Court on April 1, 1963, provided ample cause for the action of the Trial Judge in locking up the jury. The following facts were found to exist at that time (1367a-1370a):

1. A nationwide television show was scheduled from 10 to 11 that evening on the Brinkley Journal which featured an expose of the National Teamsters including a film clip on Raymond Cohen. An advance script of that program had been obtained from the National Broadcasting System,

which script was reviewed by the Trial Judge in determining that the jury should be locked up.

2. The transcript of proceedings in the recent case of *United States v. Hoffa*, tried in the United States District Court in Nashville, Tennessee, disclosed flagrant efforts to tamper with that jury. That defendant and others were subsequently convicted on that charge. Transcripts of those hearings before Judge Wilbur E. Miller were reviewed by the Trial Judge and were considered in reaching his decision to lock up the jury.

3. An election had been scheduled by the National Labor Relations Board to determine whether the Teamsters or the AFL-CIO would represent Local 107 and three other Locals then affiliated with the International Brotherhood of Teamsters. At a prior election in November of 1962, there had been so much violence that the National Labor Relations Board ruled that a new election had to be held. In reaching the decision to sequester the jury, the Trial Judge considered the right of both the defendant and the Commonwealth (1369). The Pennsylvania Superior Court held his action was proper under Pennsylvania law; and it certainly was not so devoid of justification as to fall below the standards imposed by due process.

It has long been settled that due process of law is not violated where a State limits the number of peremptory challenges. In *Ashe v. Valotta*, 270 U. S. 424 (1926), Mr. Justice Holmes, in interpreting a Pennsylvania statute on peremptory challenges in a murder case, spoke for a unanimous Court which held that due process had not been denied, declaring: "That Pennsylvania could limit the challenges on each indictment to ten does not admit doubt." 275 U. S. at 426.

In fact, Petitioners conceded at page 11 of their Petition that there is no constitutional guarantee of peremptory challenges. Since their claim is based only on state law as embodied in a statute, that statute is certainly subject to

interpretation by the state courts in limiting a group of defendants to six peremptory challenges. Stated differently, if the Commonwealth of Pennsylvania can create the right to peremptory challenges, the state courts can limit that right in a case with joint defendants, since the constitution requires none.

The practical necessity for such a rule is demonstrated by the fact that it took the better part of two weeks of a ten week trial to select a jury in this case. If the law had allowed thirty-six peremptory challenges for the six defendants, and the time of jury selection had proceeded *pro rata*, approximately twelve weeks would have been consumed in the selection of the jury alone. Here again, Petitioners showed no prejudice since they were able to make certain that they received a fair trial by eleminating any prejudiced juror on a challenge for cause following extensive *voir dire*. A great deal of the voir dire was not printed since it was completely uneventful (4539a). The portion which was printed shows that the defendants were able to select an impartial jury which is the only important factor (1210a-1365a).

There is no substance to Petitioners' claim that prejudicial meetings were held where defendants' counsel were excluded. On one occasion the trial judge met with certain prospective witnesses who had been subpeonaed, their counsel who sought to have them excused and the Assistant District Attorney. As a result of that talk which was made a matter of record in this case, the Trial Judge restricted the prosecution from calling certain witnesses and prohibited certain questions (2688a-2721a). Defendants' counsel were fully informed of that relatively inconsequential matter; and the record indicates that defense counsel knew more about those particular witnesses than the prosecutor (2710a-2714a). In any event, it was the prosecution, rather than the defense, which was limited by that incident.

Petitioners make an unspecific complaint on limitation of their cross-examination of a witness, Marjorie Battis-

fore. Defendants sought to find out her address. In view of the fact that this witness was followed and harassed by a private detective hired by an attorney for one of the defendants, the Trial Judge's limitation was entirely proper and most necessary (4607a-4655a). The use of the cardboard charts was proper since a representative period was used; and as the record shows, the evidence fully supported the facts set forth on the charts (4071a-4138a). Petitioners' unspecific complaint about the Trial Judge's conduct requires only the comment that a review of the record on any specific issue will conclusively demonstrate that the Trial Judge acted entirely properly and that the Superior Court was correct when it complimented the Trial Judge on his patient handling of the case at page 75 of 203 Pa. Super. as follows:

> "Other complaints were made as to the admission of testimony and the injection of the judge into the trial of the case and as to parts of the court's charge. To individually discuss each and every one of these matters would unduly prolong an opinion which is already too long. Suffice it to say that we have carefully reviewed each and every one of these contentions and we do not believe that, taken together or separately, they were sufficient to show that the appellants were unduly prejudiced."
>
> "We are convinced that Judge Ullman retained his composure exceptionally well in a long drawn out, hard fought trial. We are also convinced that the evidence was sufficient to justify the conviction of all appellants and that they received a fair trial."

C. *Petitioners Rights Were Not Violated by the Superior Court's Refusal to Continue This Case.*

Petitioners did not contend in the Superior Court that they were denied the effective assistance of counsel by the Superior Court's orders denying a continuance. Petitioners'

efforts to now cast their request for a continuance in a constitutional setting is unfounded on the facts. There was ample time for the preparation of this case for argument in the Superior Court. The trial ended on June 3, 1963, and the argument in the Superior Court was held more than three months later on September 9, 1963. The notes of testimony had been transcribed on a daily basis. The case was heard in its regular turn in the normal processes of listings before the Superior Court.

The public's interest required a disposition of this case in the regular course of the listing of cases, without a continuance, in view of the key officerships and positions held by four of the defendants. The Superior Court noted, with approval, Judge Gold's comment at page 42 of 203 Pa. Super. of its opinion as follows:

> " 'Local 107 is a gigantic union with more than 12,000 members situate in the greater Philadelphia area. Its immense economic influence in the transportation and allied industries is well known. We have been and are now of the belief that Local 107 is a strong, powerful, self-disciplined and militant labor organization, which, concentrated in the field of transportation, is affected with a public interest no less than the utilities, railroads and trucking industry which it serves.' "

In view of the power of Local 107 in the economic life of the Philadelphia area and of the great influence of the defendants in that Union, it was necessary that the appeal be heard without a continuance and disposed of at the earliest date. The Superior Court processed this case like any other case on its list where convicted defendants remained on bail pending a disposition of their appeals. The Commonwealth's Brief in Opposition to Lapensohn's companion Petition contains additional argument on this issue in response to his specific contentions.

D. *All the Evidence Was Relevant on the Charge of Conspiracy to Cheat and Defraud Local 107.*

Petitioners' claim that evidence was admitted on crimes such as larceny, fraudulent conversion, embezzlement, extortion and threats of violence which were not encompassed within the indictment. All of the acts proved at trial related to the underlying conspiracy and showed *how* the defendants acquired control of the Union's treasury and the various *procedures* utilized to divert fraudulently the Union's money into their own pockets. While those acts may have constituted independent crimes as well, for which Petitioners could have been sentenced to very lengthy periods of imprisonment, all those acts were obviously germane to the charge in this case.

E. *The Holding of the Superior Court on the Statute of Limitation Issue Does Not Violate the Fourteenth Amendment.*

Like all of Petitioners' complaints, this is solely a question of state law which has been decided with finality by the Pennsylvania Superior Court. The time established by the Statute of Limitations and the interpretation of that statute is obviously a matter of state law. If Pennsylvania wished, it could establish a five year statute of limitations for conspiracy as it has for certain other criminal offenses. Acts of March 31, 1860, P. L. 427, §77; March 23, 1877, P. L. 26, §1; April 23, 1889, P. L. 48, § (19 Purdon's Statutes 211, 212, 214). Petitioners could not realistically contend that their constitutional rights were violated by a longer statute of limitations. Similarly, there is no logical basis for their complaint that their constitutional rights were violated by the Superior Court's interpretation of what that statute means.

On the facts, the Superior Court was obviously correct for the reasons summarized in their opinion at pages

59 to 65 of 203 Pa. Super. A key check on the Local 107 Bank Account was cashed on September 19, 1957, by one of the co-conspirators or an agent for a co-conspirator. Moreover, the evidence virtually demonstrated (and, in any event, was at least sufficient to support the jury's verdict) that co-conspirator Grace cashed the check himself on September 19, 1957. There are 222 checks in evidence where that bank required that bearer paper be endorsed by the person who received the cash. Thus, the evidence showed that Grace, one of the co-conspirators named in the indictment who died prior to trial, cashed the key check on September 19, 1957. That act was within two years of September 18, 1959, the time the bill of indictment was returned. As a matter of state law, it was the only sensible conclusion. Under any circumstance, such an interpretation of the state statute of limitations could not conceivably be violative of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

The record shows that Petitioners were guilty as charged and that each received a fair trial. The allegations of error related only to state law problems. There was no violation of any constitutional right. Accordingly, the Petition For a Writ Of Certiorari should be denied.

Respectfully submitted,

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BRIEF IN OPPOSITION FOR RESPONDENT, THE COMMONWEALTH OF PENNSYLVANIA

Respondent, the Commonwealth of Pennsylvania, prays that the Petition for a Writ of Certiorari to review the Order of the Supreme Court of Pennsylvania, entered on May 27, 1964, be denied.

STATEMENT OF THE CASE

Petitioner, Ben Lapensohn, is one of seven officials and employees of Local 107 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America who were indicted on September 18, 1959, for conspiracy to cheat and defraud that Union. After extensive pre-trial proceedings, six defendants were brought to trial on March 25, 1963, with the action being abated as to one

defendant who had died. Extensive evidence was presented by the Commonwealth in a trial that lasted ten weeks and one day in which ninety-eight witnesses testified and 1,116 exhibits were introduced into evidence. The printed record in the case, exclusive of exhibits, runs 4,540 pages. Neither defendant Lapensohn nor any other defendant took the stand. No evidence was presented on behalf of any defendant.

On June 3, 1963, the jury returned verdicts of guilty as to Petitioner as well as all other defendants. Petitioner Lapensohn, who was the second most important figure in the conspiracy, received the second most severe sentence which was ten months to two years in prison. Following the conclusion of the trial, this procedural timetable followed:

1. Arguments on post-trial motions were heard on July 10, 1963.

2. Petitioner's and the other defendants' post-trial motions were dismissed on July 15, 1963, and the judgments of sentence were imposed.

3. Defendants appealed to the Superior Court of Pennsylvania on July 15, 1963.

4. On July 19, 1963, and August 13, 1963, defendants filed petitions for continuance in the Superior Court. On July 19, 1963, and August 15, 1963, the Commonwealth of Pennsylvania filed Answers to those petitions opposing a continuance. The Superior Court denied both petitions for continuance*

* While Petitioner printed copies of the applications for continuance at pages 41a and 50a of the Joint Appendix to Petitions for Writ of Certiorari to the Supreme Court, Petitioners did not print the Commonwealth's Answers. So that this Court may have all the facts, the Commonwealth is including its Answers to those petitions in a separate Appendix to Briefs In Opposition to Petitions For Writs of Certiorari, which is being filed with this Brief.

5. The Superior Court of Pennsylvania heard argument for a full day on September 9, 1963 in a session which began at 10 A. M. and ended at 4:50 P. M. with no other case being heard on that day.

6. On March 19, 1964 the Superior Court of Pennsylvania affirmed the convictions by a six to one vote, and a comprehensive 37 page opinion was filed by that Court dismissing all of defendants' allegations of error. *Commonwealth v. Cohen et al.*, 203 Pa. Super. 34 (1964). One Superior Court Judge dissented on narrow state-law-substantive grounds that the prosecution was barred by the Pennsylvania Statute of Limitations.

7. After the Supreme Court of Pennsylvania refused, in its discretion, to review this case, the Petition for a Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. This Case Presents no Federal Question and No Important Issue of any Kind.

There is no legitimate federal question involved in this case. All of the issues raised by Petitioner in the Superior Court were argued in terms of substantive or procedural questions of Pennsylvania state criminal law. An examination of the specific issues raised in this Petition for Certiorari, set forth below, demonstrates that Petitioner is complaining about questions of state law which fall outside the ambit of jurisdiction of the Supreme Court of the United States.

As to the questions of state law, the Pennsylvania Superior Court has given this Petitioner and his Co-Defendants their full day in (the Appellate) Court. Their numer-

ous allegations of error have been comprehensively and conscientiously considered, and properly rejected.

The Pennsylvania Supreme Court refused to consider this case because there was not even any significant question of state law presented. Unlike the Supreme Court of the United States where four justices must concur before certiorari may be granted, the Pennsylvania Supreme Court will review a decision from the Pennsylvania Superior Court if any one of seven judges vote to do so. Pennsylvania Act of June 24, 1895, P.L. 212, §7(e), 17 Purdon's Statutes 190. The lack of substance in Petitioner's complaints is indicated by the fact that not one of seven Pennsylvania Supreme Court Judges thought this case was worthy of review by that Court.

This case involves only a misdemeanor on which a very moderate sentence was imposed, considering the nature of Petitioner Lapensohn's conduct proved on the single bill of indictment charging conspiracy to cheat and defraud Local 107 of the Teamsters Union. This Court should not take time from its busy, crowded schedule to review this case which has a record in excess of 4,500 pages, where the Pennsylvania Superior Court has given full consideration to all the allegations of error on a case which, realistically viewed, involves only state-law issues.

II. The Specific Reasons Advanced by Petitioner Do Not Justify Review by This Court.

A. *Petitioner's Rights Were Not Violated by Use of the District Attorney's Bill of Indictment Instead of a Preliminary Hearing.*

It has long been settled that a defendant has no constitutional right to a preliminary hearing. *Lem Woon v. Oregon*, 229 U.S. 586 (1912). And approval of the procedure of instituting a criminal action on information filed by the prosecutor without a prior judicial determination of probable cause was reaffirmed in *Beck v. Washington*, 369 U.S.

541, 545 (1962). Petitioner asserted that he had a right to a preliminary hearing under a Pennsylvania Act of Assembly, which is true as a general proposition subject to certain exceptions; and this case falls within one of the traditional exceptions under Pennsylvania law where no preliminary hearing need be held. The state law which governs the use of the District Attorney's Bill of Indictment is summarized in the opinion of the Pennsylvania Superior Court at pages 3a to 8a in the Joint Appendix to Petition. There is no reason to summarize or restate the Pennsylvania law reviewed by the Superior Court in their opinion in this case. Applying Pennsylvania law on this subject to this case, the Pennsylvania Superior Court concluded that the District Attorney's Bill of Indictment was properly used. There is no federal question involved no matter what contortions are attempted to mold this hollow complaint into a Fourteenth Amendment issue.

The proceedings in the Pennsylvania courts in this case, including the use of the District Attorney's Bill of Indictment, afforded Petitioner more than the minimum requirements of due process of law. As the record shows, Judge (then District Attorney) Victor H. Blanc obtained approval from the Court of Quarter Sessions, acting through President Judge Vincent A. Carroll, in securing permission to present evidence to the Grand Jury without a preliminary hearing (10a). Judge Carroll's review of the District Attorney's action afforded Petitioner his first line of procedural protection. The Grand Jury then heard evidence for two days before returning the indictment in this case. These proceedings were, of course, only the preliminaries. Defendants were then tried by judge and jury with all of the traditional procedural safeguards.

Petitioner's current contention of prejudice is a phantom. At no time in the long trial or afterward has Petitioner claimed that he was surprised by any evidence at all or pointed to any harm caused by the absence of a preliminary hearing. On the contrary, the record shows Petitioner re-

ceived notice, a chance to be heard, a full opportunity to defend himself and all the other procedural safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment.

Petitioner Lapensohn further complains that his case was different from the other defendants in that there was no emergency as to him since the statute of limitations had tolled thereby allowing the prosecuting attorney four additional months in which to proceed against Lapensohn. Lapensohn did not raise this issue in the Trial Court. The Assistant District Attorney has searched his file, as well as his recollection, and can find no indication that Lapensohn ever raised the current issue before the Trial Judge in the Habeas Corpus Hearings in the way he is arg g it before this Court. Lapensohn alludes to having rai is issue by stating at page 28 of his Petition:

> "... this had been argued in a sup...nental brief filed with the Court."

The District Attorney's file shows no such Supplemental Brief; but more important it is not the Petitioner's Supplemental Brief which controls, but rather the petition and hearings which were made a part of the record in the lower court proceedings. Briefs are not a part of the record, and as such provide no record basis for raising and preserving legal issues in the trial courts. The Motion to Quash, which duplicated the Habeas Corpus Petition, did not raise the issue (19a-20a). The record in the Habeas Corpus Hearings shows this issue was not raised (54a-1152a). Thus, in the Habeas Corpus Proceedings in the Trial Court, Appellant Lapensohn contended that the bill of indictment was defective because the District Attorney's delay created the emergency and therefore the bill of indictment was improperly returned. At no time did Lapensonn contend that his situation was different from the other defendants because there was more time to hold a preliminary hearing as to him since the statute of limitations was tolled.

Considering the merits of this contention now raised by Lapensohn, the District Attorney's Bill of Indictment was properly returned as to Lapensohn under the settled law of Pennsylvania as set forth in *Rowand v. Commonwealth*, 82 Pa. 405 (1876) and *Commonwealth v. Carey*, 201 Pa. Super. 292 (1963) since the District Attorney did not abuse his discretion; and in any event, Lapensohn suffered no harm. The relative uncertainty of the proofs on Lapensohn's final participation in the conspiracy and on the specific dates when he was outside the jurisdiction created sufficient doubt so that the District Attorney was justified in proceeding against Lapensohn with a District Attorney's bill of indictment. While it was patently clear that Lapensohn was deeply involved in the conspiracy because of his participation in the Altered Kirsch Checks (PHASE 8, discussed at pages 15 to 16 of Lapensohn's Petition), the Missing Checks (PHASE 16, discussed at pages 19 to 20 of Lapensohn's Petition), the Katz Check (PHASE 6, discussed at pages 14 and 15 of Lapensohn's Petition,) the Kanner Checks (PHASE 7, discussed at page 15 of Lapensohn's Petition), The Food Fair Transaction (PHASE 20, discussed at pages 22 to 24 of Lapensohn's Petition), The Mastrin Diversion (PHASE 9, discussed at page 16 of Lapensohn's Petition), The Lazovitz-Marshall Matter (PHASE 10, discussed at pages 16 to 17 of Lapensohn's Petition), and The Insurance Payments (PHASE 5, discussed at pages 14 to 15 of Lapensohn's Petition),* the District Attorney could not be certain that Lapensohn's acts on September 14, 1956, or October 2, 1956, would stand up, in the face of all possible defenses, as conclusive acts in furtherance of the conspiracy.

Thus, it might have been necessary to rely on earlier acts in July or August 1956 which were not used at trial,

* In order to avoid lengthy summarizations of the evidence against Lapensohn, the Commonwealth has referred to the categories itemized in Lapensohn's Petition although those Summaries omit much of the damaging evidence against him.

such as certain Friedman checks. Similarly, the Commonwealth could not be certain, although it had reliable information, that it could conclusively prove that Lapensohn was outside Pennsylvania from May 1957 through July 1958. *Therefore, the dates of Lapensohn's last acts and the period when he was outside of the country presented the risk that the prosecution as to Lapensohn would be barred unless a District Attorney's bill of indictment were utilized.* It should be noted that these factors were not developed in detail at the proceedings in the Trial Court on the Habeas Corpus Petition because Lapensohn's counsel did not raise this issue.

In addition, the practical necessities of this case required treating Lapensohn the same as the other defendants. A preliminary hearing as to Lapensohn alone would have required virtually presentation of the entire Commonwealth's case or at least a major part of it as to Lapensohn as well as all the other defendants. If the District Attorney had proceeded against Lapensohn at a preliminary hearing without affording the other defendants the same procedural treatment, the Commonwealth would have run the risk of denying some of the defendants equal protection of the law.

In Lapensohn's Petition, at page 40, he cites the principle that if the statute of limitations ran against the other defendants, then Lapensohn could not be tried since he could not be found guilty of conspiring with himself. Had he been given a preliminary hearing by himself, he would have complained that he could not be prosecuted for conspiracy with himself. As a practical matter, the District Attorney had to treat the joint conspirators alike; and there was nothing in Lapensohn's situation which called for different treatment.

The unified nature of the case justified the District Attorney in treating Lapensohn the same as the other defendants. The conspiracy was a unified whole with Lapensohn being the second major conspirator based on all the

evidence. Proceeding alone against Lapensohn at a preliminary hearing would have injected many procedural and substantive problems. Accordingly, the District Attorney was justified in treating all the defendants equally. Therefore, the reasons which made the District Attorney's Bill of Indictment valid as to the other defendants apply as well to Lapensohn.

B. *Petitioner Was Not Deprived of a Fair Trial or a Fair and Impartial Arbiter.*

An examination of the record in this case shows that the Pennsylvania Superior Court was correct in evaluating the Trial Judge's conduct of the case at page 75 of 203 Pa. Super. as follows:

> "Other complaints were made as to the admission of testimony and the injection of the judge into the trial of the case and as to parts of the court's charge. To individually discuss each and every one of these matters would unduly prolong an opinion which is already too long. Suffice it to say that we have carefully reviewed each and every one of these contentions and we do not believe that, taken together or separately, they were sufficient to show that the appellants were unduly prejudiced."
>
> "We are convinced that Judge Ullman retained his composure exceptionally well in a long drawn out, hard fought trial. We are also convinced that the evidence was sufficient to justify the conviction of all appellants and that they received a fair trial."

The clue to this issue is, realistically viewed, conceded by Lapensohn when he states at page 28 of his Petition that the allegations of judicial impartiality may have been caused:

> ". . . by the efforts of counsel for the various defendants in attempting to protect to the fullest extent the respective and often adverse interests of their clients. . . ."

The assertion that the Trial Judge assumed the role of the prosecutor in the trial is preposterous. The record shows that the Trial Judge asked a very small number of questions for such a very long trial. At page 33, Lapensohn asserts that:

> ". . . the judge even instructed the District Attorney as to what questions he would allow the District Attorney to ask."

Such a statement is completely misleading. The Judge sustained Lazovitz' plea of privilege on most of the areas which the District Attorney wanted to cover. Therefore, the Court instructed the Prosecutor as to what questions could be asked. The Trial Judge was not functioning as the Prosecutor, but rather he was delimiting the Assistant District Attorney after overruling the Commonwealth's position.

When the Trial Judge commented that Mrs. Battisfore was "seriously threatened", counsel for Lapensohn knew precisely what the Judge was talking about. At page 34 of his Petition Lapensohn then states:

> "There is absolutely no evidence supporting any implication of impropriety or in any manner connecting appellant or any other defendant with such sinister conduct as hinted here."

That is an astounding misquotation of what occurred. The fact of the matter is that Lapensohn's Counsel was the one who hired a private detective to follow Mrs. Battisfore after the Court had ordered that no one should talk to or interfere with the witness during the recess while she was still subject to examination in court. When the Trial Judge mentioned the incident, outside the presence of the jury, it was Lapensohn's Counsel who rose to explain the situation (3482a-3483a); and at the further hearing, Lapensohn's Counsel conceded that he had requested the detective agency to follow Mrs. Battisfore (4607a-4655a).

The case, *Glasser v. United States*, 815 U.S. 60 (1942), is a leading case against Petitioner's argument. The con-

duct of the trial judge was first mentioned at 315 U.S. at page 82. The opinion sets out the duties of a trial judge, and his responsibilities, in familiar words, and then gives a listing of his alleged departure from the ideals set out. One is brought almost to the point of believing that Petitioner Lapensohn copied the list; which is worth repeating here: (pages cited at beginning of paragraph)

> "Petitioners contend that the trial judge made remarks prejudicial to them, committed acts of advocacy, questioned them in a hostile manner, unduly limited cross-examination, and in general failed to maintain an impartial attitude."

Although the incidents described and referred to seem to outweigh the claims here made, the highest Court brushed them aside at page 83 of 315 U.S.: .

> "The alleged undue limitation of cross-examination merits scant attention. The extent of such examination rests in the sound discretion of the trial court. Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624. We find no abuse of discretion."
>
> "Perhaps the court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the substantial rights of the petitioners were not affected. The trial was long and the incidents relied upon by petitioners few. *We must guard against the magnification on appeal of instances which were of little importance in their setting.* Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240, 60 S. Ct. 811, 852, 84 L.Ed. 1129; *Goldstein v. United States*, 8 Cir. 63 F. 2d 609; *United States v. Warren*, 2 Cir. 120 F. 2d 211." (Emphasis added)

In considering the conduct of the Trial Judge, we must bear in mind that the Petitioners were brought to trial only after almost 3½ years of continual struggle to avoid facing

a jury. Every delaying maneuver was used. On trial at last, the tactics were directed towards the goal of a mistrial, with the added maneuver of pseudo-conflicts among the defendants as to whether objections should be pressed on certain matters — all of which wound up with complete unanimity as to the motion for withdrawal of a juror.

The instances cited by Petitioner under this heading do not show partiality. The comment (apparently to the jury, after the conclusion of a conference in chambers) that the Court had just wasted another half-hour, applied to the prosecution as well as to the defense. The other instances are revealed upon examination to be mere shadow-boxing, ending with the inevitable motion for withdrawal of a juror, or efforts to get the trial back to an even tenor. At page 31 the Petitioner attempts to read into sua sponte interpositions by the Court during the examination or cross-examination of the witness, an effort by the Court to further the prosecution and to counteract the effect of cross-examination. No such inference can validly be deduced from the samples given, which we may assume, are those which Petitioner believes will best point up his argument.

Petitioner tries to build his theory upon the fact that, in the colloquy quoted at page 31, the Court volunteered the statement that if an objection were made to the question put by defense counsel, he would sustain it. The objection was made, and the reply of the attorney for Petitioner, "If your Honor please, all right", indicated that he agreed that his question was objectionable. He took no exception, but a moment later moved for the withdrawal of a juror. One fault of Petitioner's argument is that there is nothing in the passage to indicate that the action of the Court was helpful to the prosecution or was thus intended. Actually the Prosecutor may well have sat back in poker-faced satisfaction to have the question answered, even though objectionable; it might very well have opened the door to a re-direct examination upon a subject which he could not o herwise have pursued. Such incidents do happen, and did happen during the trial.

The next point of attack to be selected for quotation of tes mony involves the charge that the Court "cross-examined witnesses to minimize the effect of cross-examination by defense counsel and to rehabilitate their testimony." This is a most serious accusation, and one which should not be made without the gravest cause. The leading incident chosen for quotation is one in which counsel for Petitioner, rather than the Court, was at fault. Counsel sought to get into the jury by implication very much more than was warranted by the testimony of the hand-writing expert on direct examination. From the frank and scrupulously correct admission by the expert that he could not under oath identify the forged signature "Jerome S. Friedman" with the signatures of Lapensohn, Cohen or Grace, Counsel sought to draw a blanket exoneration over the defendants. It was perfectly proper for the Court to avert the confusion which might well have been raised in the minds of the jurors, through bringing out that the converse was likewise implicit in the answer, and that the witness was not completely placing the mentioned defendants beyond the reach of other testimony which might be introduced that one or more of the defendants had forged the signatures.

Lapensohn's petition at page 32-33 selects another passage for support of this contention. This is a trivial incident, in which the Court endeavored to clear up the meaning of the answer of a witness who, under cross-examination, was displaying a confusing lack of recollection as to what payments he had received for picket-duty. The witness was one of a series of witnesses on the same subject, and it would be ridiculous to conclude that any harm was worked against Petitioner. The mention of the witness Gorman reveals no partiality.

The third point which appellant urges under this heading is that the Court consulted with several witnesses "off record and without the presence of defense counsel, but in the presence of the jury." This contention was not pursued,

and the record shows that this exception was inconsequential.

Petitioner seeks to construct prejudicial error from the fact that the Trial Judge interrogated two prospective witnesses who, it is claimed, had indicated they intended to assert their privilege against self-incrimination. Petitioner concedes that absence of evidence that the witnesses were not called in good faith and that "their testimony was not essential to the case". Appellant cites in support of this claim of error *Namet v. United States*, 373 U. S. 179 (1963). The defense there relied upon prejudice arising from the refusal of witnesses to testify in a Federal gambling tax case. The Court found no error in the calling of the witnesses, saying:

> "In the first case, the record does not support any inference of prosecutorial misconduct. It is true, of course, that Mr. Fitzgerald [Attorney for both defendants and the witnesses] announced that the Kahns would invoke their testimonial privilege if questioned. But certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous . . . We cannot find that these few lapses, when viewed in the context of the entire trial, amounted to planned or deliberate attempts by the government to make capital out of witnesses' refusal to testify . . ."

The opinion cites as cases which found no reversible error when such minor lapses occurred through a long trial; *United States v. Hiss*, 185 F. 2d 822 (C.A. 2d Cir. 1950); *United States v. Amadio*, 215 F. 2d 605, 614 (C.A. 7th Cir. 1954). The Court adds that even when the objectionable inferences might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error.

The long list of record citations appearing on page 36 of the petition reveal nothing more serious than a momen-

tary impatience at the harassing tactics of defense counsel, obviously aimed at one more motion for a mistrial. Excerpts from a record cannot convey a true picture. As Mr. Justice Frankfurter said in his dissent in *United States v. Glasser*, supra, (315 U.S. at 88; 62 S. Ct. at 473) (dissenting from reversal as to Glasser) :

> "It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record."

Even a judge, placed on trial on a question of his impartiality, is entitled to have his actions judged in the light of time, place, circumstances. The Court here shows up in the record as worthy of the judgment that he acquitted himself well.

C. *Petitioner Was Not Deprived of Effective Assistance of His Counsel.*

Petitioner did not contend in the Suprerior Court that he was denied the effective assistance of counsel by the Superior Court's orders denying a continuance. Petitioner's efforts to now cast their request for a continuance in a constitutional setting is unfounded on the facts. There was ample time for the preparation of this case for argument in the Superior Court. The trial ended on June 3, 1963, and the argument in the Superior Court was held more than three months later on September 9, 1963. The case was heard in its regular turn in the normal processes of listings before the Superior Court.

The public's interest required a disposition of this case in the regular course of the listing of the cases, without a continuance, in view of the key officerships and positions held by four of the defendants. The Superior Court noted, with approval, Judge Gold's comment at page 42 of 203 Pa. Super. as follows:

> "'Local 107 is a gigantic union with more than 12,000 members situate in the greater Philadelphia area. Its immense economic influence in the transportation and allied industries is well known. We have been and are now of the belief that Local 107 is a strong, powerful, self-disciplined and militant labor organization, which concentrated in the field of transportation, is affected with a public interest no less than the utilities, railroads and trucking industry which it serves.'"

In view of the power of Local 107 in the economic life of the Philadelphia area and of the great influence of the defendants in that Union, it was necessary that the appeal be heard without a continuance and disposed of at the earliest date. The Superior Court processed this case like any other case on its list where convicted defendants remained on bail pending a disposition of their appeals.

The Commonwealth categorically denies Petitioner Lapensohn's theories that the post-trial timetable was characterized by "inordinate hate" or that such a sequence is atypical of cases in Pennsylvania, any state in the Union or any nation following Anglo-Saxon principles of jurisprudence. Such sweeping generalizations are obviously erroneous when compared with the chronology of events which show that the appellate argument was held more than three months after the conclusion of the trial. Petitioner sought a continuance on the argument that the record could not be printed in less than eight to sixteen weeks, and Petitioner now uses the absence of a printed record as the basis for alleged prejudice. When the Assistant District Attorney saw that allegation in the petition for continuance, he quickly found a printer who could reproduce the record in sufficient time as set forth in paragraph 8 of his sworn Answer. Petitioner further contends that defendants had only one typewritten copy of the record. The fact is that the defendants received a daily copy of the notes of testimony as the trial progressed which was photostated. This was

clearly visible in the course of the trial when some defense counsel displayed duplicate photostatic copies. These arguments are mere makeweights and constitute no showing of prejudice.

The record shows that there were nine attorneys who appeared for the six defendants. It is totally unfounded to contend that the mandate of *Gideon v. Wainwright*, 372 U.S. 335 (1963), is violated where such a battery of attorneys has three months to prepare for an appeal. Petitioner and his co-defendants criticized the District Attorney for his delay in the early stages of this proceeding, and then the defendants engaged in delaying tactics for approximately 3½ years before the case was brought to trial. Under those facts the prosecution was justified and, in fact, obligated to press for a prompt appellate disposition in accordance with the rules of court in a case which was so important to the Commonwealth of Pennsylvania.

The logic of Petitioner's argument on this issue, and in fact throughout his petition, is characterized by his assertion at page 38:

> "For the Supreme Court of the State thereafter to refuse to review the proceedings, even though issues raised were substantial enough to obtain a dissent in the Superior Court, practically amounts to an abandonment of its judicial obligation."

On the contrary, the refusal of the Pennsylvania Supreme Court to review this case indicates a total absence of merit in the allegations of error. As previously indicated, an appeal may be taken from the Pennsylvania Superior Court if any one of the seven judges of the Pennsylvania Supreme Court vote to do so. The failure of Petitioner to attract a single vote shows the lack of merit in the appeal rather than "abandonment of its (the Pennsylvania Supreme Court's) judicial obligation."

Parenthetically, it is interesting to note that while Petitioner argues that he did not have enough time to prepare

for the Superior Court argument, he uses the same arguments (although he now seeks to make constitutional issues out of them instead of questions of state law) and in many places Petitioner does not even change the prior language. For example, pages 48 to 58 of Lapensohn's Superior Court brief are reproduced almost verbatim at pages 28 to 37 of this petition. The quality of Lapensohn's Petition, which was present in the Superior Court, demonstrates that Petitioner had extremely able counsel.

D. *The Holding of the Superior Court on the Statute of Limitations Issue Does Not Violate the Fourteenth Amendment.*

Like all of Petitioner's complaints, this is solely a question of state law which has been decided with finality by the Pennsylvania Superior Court. The time established by the Statute of Limitations and the interpretation of that statute is obviously a matter of state law. If Pennsylvania wished, it could establish a five year statute of limitations for conspiracy as it has for certain other criminal offenses. Acts of March 31, 1860, P.L. 427, §77; March 23, 1877, P.L. 26, §1; April 23, 1889, P.L. 48, §1 (19 Purdon's Statutes 211, 212, 214). Petitioners could not realistically contend that their constitutional rights were violated by a longer statute of limitations. Similarly, there is no logical basis for their complaint that their constitutional rights were violated by the Superior Court's interpretation of what that statute means.

On the facts, the Superior Court was obviously correct for the reasons summarized in their opinion at pages 59 to 65 of 203 Pa. Super. A key check on the Local 107 Bank Account was cashed on September 19, 1957, by one of the co-conspirators or an agent for a co-conspirator. Morever, the evidence virtually demonstrated (and, in any event, was at least sufficient to support the jury's verdict) that co-conspirator Grace cashed the check himself on Septem-

ber 19, 1957. There are 222 checks in evidence where that bank required that bearer paper be endorsed by the person who received the cash. Thus, the evidence showed that Grace, one of the co-conspirators named in the indictment who died prior to trial, cashed the key check on September 19, 1957. That act was within two years of September 18, 1959, the time the bill of indictment was returned. As a matter of state law, it was the only sensible conclusion. Under any circumstance, such interpretation of the state statute of limitations could not conceivably be violative of the Fourteenth Amendment of the United States Constitution.

Similarly, Lapensohn complains in the Supreme Court of the United States that there was no proof that he was unavailable for service of process and such proof was necessary in Pennsylvania under *Commonwealth v. Turner*, 176 Pa. Superior 32 (1954). Here again, the question is obviously governed by state law and the state appellate courts of Pennsylvania have categorically rejected Lapensohn's contention. 243 Pa. at 65. The Pennsylvania Superior Court's interpretation on service of process is obviously not so lacking in the fundamentals of fairness as to be violative of the Fourteenth Amendment.

E. *Petitioner Was Not Prevented from Selecting a Fair Jury.*

Petitioner again seeks to cast a purely state question into a constitutional mold by contending he was denied equal protection of the law when the six joint defendants were allowed a total of six peremptory challenges. Petitioner's contention has no support in the United States Constitution, since there is no constitutional right to any peremptory challenges. It has long been settled that due process of law is not violated where a state limits the number of peremptory challenges. In *Ashe v. Valotta*, 270 U.S. 424 (1926), Mr. Justice Holmes, in interpreting a Pennsylvania statute on peremptory challenges in a murder case,

spoke for a unanimous Court which held that due process had not been denied, declaring: "That Pennsylvania could limit the challenges on each indictment to ten does not admit doubt." 275 U.S. at 426. Petitioner's sole basis rests on a Pennsylvania statute which allows peremptory challenges. Just as the state through such a statute may allow peremptory challenges, the state courts may interpret that statute and limit its scope as a matter of state law.

The practical necessity for such a rule is demonstrated by the fact that it took the better part of two weeks of a ten week trial to select a jury in this case. If the law had allowed thirty-six peremptory challenges for the six defendants, and the time of jury selection had proceeded *pro rata*, approximately twelve weeks would have been consumed in the selection of the jury alone. Here again, Petitioners showed no prejudice since they were able to make certain that they received a fair trial by eliminating any prejudiced juror on a challenge for cause following extensive *voir dire*. A great deal of the *voir dire* was not printed since it was completely uneventful (4539a). The portion which was printed shows that the defendants were able to select an impartial jury which is the only crucial factor (1210a-1365a). Thus, the issue of peremptory challenges was not determinative in providing Petitioners with an impartial jury and fair trial. Petitioner makes a general charge that he was limited on *voir dire* with no specific complaint to any designated portion of the record. On the contrary, the record at pages 1210a to 1365a show that Petitioner was accorded ample latitude on the questioning of prospective jurors on *voir dire*.

F. *The Evidence Conclusively Demonstrated Petitioner Was Guilty of Conspiracy to Cheat and Defraud Local 107.*

The resemblance between Ben Lapensohn and "Shuffling Sam" is fictional. This Petitioner has the temerity to contend that there was "no evidence" against him, a con-

tention which counsel for Petitioners Cohen, Hartsough, Elco, and Berman, (in companion petition No. 420) could not make without blushing. The argument of Petitioner Lapensohn on this issue is not even colorable. Of course, in the state court, Lapensohn contended that there was not sufficient evidence; but, as usual, Lapensohn now tries to cast the issue in a constitutional setting by the absurd contention that there was no evidence.

The record shows that Lapensohn was second only to Raymond Cohen in deep involvement in the conspiracy. The evidence demonstrated that Lapensohn was extensively involved in the conspiracy. He was a crucial figure in PHASES 5, 6, 7, 8, 9, 10, 16 and 20. Lapensohn's fraudulent activity is amply demonstrated by the fact that he was most closely connected with the evidence showing concealment, artifice and deception. These acts show that Lapensohn was the architect of the deceptive practices and was involved in seven of the ten areas of deceptive practices: his name was erased from the Kirsch checks in an effort to conceal; the ten missing checks were payable to Lapensohn; his invoice concealed the payment for insurance on Mrs. Cohen's Cadillac convertible; he was the principal deceptive actor in the Food Fair stock pay offs; he was involved in the Marshall concealment; he participated in pre-arranging Local 107 meetings and he was involved in the numerous uttering of forged checks. The following is a partial list of his acts in furtherance of the conspiracy:

(1) Six checks drawn on Union funds and paid to the order of Jerome S. Friedman in the total amount of $4,660.62 were shown to contain the forged endorsements of the payee and were cashed at the same bank and on the same day that Lapensohn made deposits to his personal account. Four deposits were in identical amounts; the remainder show a close relationship to the forged checks.

(2) Lapensohn arranged for insurance to be purchased and paid for with Local 107 funds for defendants' and Mrs. Cohen's personal use.

(3) Another Union check in the amount of $1,000.00 payable to Joseph E. Katz and containing the forged endorsement of the payee was cashed at the same bank and on the same day when Lapensohn cashed a $1,000.00 check and deposited $478.41 of the proceeds in his own account.

(4) A number of checks payable to and containing the forged endorsements of David Kanner were shown to have been cashed at the same bank where Lapensohn maintained an account. One of these checks in the amount of $1,750.00 was cashed on the same day on which Lapensohn was shown to have cashed a check for an identical sum. One of the forged Kanner checks was for $2,500.00 dated April 11, 1956 (X-27). According to Marjorie Battisfore, Lapensohn was given a $2,500.00 check payable to David Kanner for transmittal in April, 1956.

(5) Lapensohn received $1,000.00 out of a Local 107 check for $2,500.00 (Ex. 43) payable to Philip Mastrin, architect of the Local 107 building constructed in Wilmington, Delaware.

(6) The following securities were received by Lapensohn or his straw shortly after Local 107 gave up trailer drops to Food Fair Stores, Inc.:

a. Two thousand shares of Food Fair Properties common stock were acquired for $1.00 per share at a time when the market price was 3½ to 3⅞. Stock was issued in the name of a straw, Jack Shore, who is Lapensohn's brother-in-law, and who had been supplied with funds by Lapensohn;

b. Two hundred units for bonds and the common stock of Food Fair Properties, Inc. were purchased by Shore with Lapensohn's funds at a price substantially below market;

c. Lapensohn purchased five hundred shares of Dan River Mills common stock for $10,000.00 during a period when these securities were trading for approximately $30.00 per share.

All of the above securities were made available to Lapensohn by Louis Stein who was President of Food Fair Stores, Inc.

(7) Four checks totalling $11,847.95, issued by the Union to the order of M. M. Marshall & Company, Inc., which constructed a building for Local 107 in Wilmington, Delaware, were not entered on the books of Marshall. One check in the amount of $2,967.95 (Ex. 472) contained the forged endorsement of the payee and had been cashed on the same day and by the same teller who handled a deposit in Lapensohn's account. Another check in the amount of $4,800.00 was also cashed under similar circumstances. This latter item did not appear in the Company's receipts ledger and although it is entered in the summary of buildings and receipts, this entry was shown to be an alteration. Finally, the other two checks in the respective amounts of $3,125.00 and $955.00 had been cashed on the same day and by the same teller who handled a deposit to Lapensohn's account and who cashed a check payable to and containing the forged endorsement of David Kanner.

(8) Ten checks totalling $9,523.7[illegible] payable to Ben Lapensohn for "Personal Services" and "Services Rendered" were shown to be missing from the Union's records. Moreover, the Locals' checks did not contain vouchers in support of these items. Three other similar checks totalling $2,662.50 for "Personal Services" were found to bear Lapensohn's endorsement. There were no vouchers for the latter three checks.

(9) Local 107 drew two checks to the order of Samuel Kirsch. One check in the amount of $4,500.00 contained erasures of the notation "OK by L. L. Lapenson of Teamsters Lo" and the other, a $4,000.00 check, contained erasures of the notation "OK identity by Lapenson of Teamsters Lo 107". The two checks were presented, cashed and paid out of 107's funds. Mr. Kirsch, who died on April 8, 1958, had been a salesman of Rolee Advertising Agency which was controlled by Lapensohn.

CONCLUSION

The full involvement of Petitioner Lapensohn can be appreciated only by detailed review of the record. This Petitoner has no justification for asking this busy, overworked Court to review a 4,500 page record for him on the basis of the very general assertions set forth at page 46 as follows:

> "The Superior Court merely sets forth the summary of the evidence, in many instances misinterpreting the facts or drawing inferences not justified by the facts, and simply concludes that the evidence was sufficient to sustain the convictions."

Without specifying the Superior Court's misinterpretations, Petitioner calls upon this Court to ferret them out. A search for such alleged misinterpretations will result in the Commonwealth's benefit in leading to an examination of the record which conclusively demonstrates that Petitioner and his co-defendants were guilty and that all received a fair trial.

Notwithstanding Petitioner's repeated efforts, he has merely raised a series of state-law questions which have been decided with finality by the Pennsylvania Superior Court. There is not even a federal question, let alone a meritorious one which justifies review by the Supreme Court of the United States. Accordingly, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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